COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1987

Nova Scotia

Department of Labour

Research Division

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1987

NOVA SCOTIA DEPARTMENT OF LABOUR
RESEARCH DIVISION

HONOURABLE RONALD S. RUSSELL, C.D.
MINISTER

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DEPUTY MINISTER

ISSN 0226-3890

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FOREWARD

This publication is the ninth summary of grievance arbitration decisions (awards) produced by the Nova Scotia Department of Labour. The decisions listed are those which have been filed in accordance with amendments to the *Trade Union Act* effective May 1978. On occasion summaries of arbitrations outside the jurisdiction of the Act have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Nova Scotia *Trade Union Act* and have been included as a matter of general interest.

Appeals of arbitration decisions made to the Supreme Court of Nova Scotia do not necessarily get filed with the Nova Scotia Department of Labour. Results of appealed decisions are received on an *ad hoc* basis and are reported as they arrive.

Part 1 of this publication lists grievance arbitration awards by decision number. All indices are retrospective to include the years 1978 through 1987. For summaries of decisions previous to 1987 it is necessary to refer to the appropriate issue for that year. Indexation of arbitration awards is based on *Canadian Labour Arbitration* by Donald J. M. Brown and David M. Beatty (Agincourt: Canada Law Book Co., 2nd ed., 1984).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Inquiries relating to the enclosed can be directed to the Nova Scotia Department of Labour, Research Division, Library, P. O. Box 697, Halifax, Nova Scotia, B3J 2T8 (Phone: 424-4313).

Jean Dobson
Director

Research Division
Nova Scotia Department of Labour
Halifax, Nova Scotia
1989

DECISION 87-1

Dartmouth General Hospital and Community Health Centre **AND** Canadian Brotherhood of Railway, Transport and General Workers, Local 606

J.A. MacLellan, Arbitrator

Ronald Pink, for the Union
Brian Johnston, for the Employer
January 2, 1987

ISSUES: Working Hours and Shifts 5:3100, Reasonableness 5:3100, Transfer Between Shifts 5:2000; Good Faith - Schedules 5:3100; Management Rights 5:0000, Schedules 5:3100; Past Practice 3:4430.

CIRCUMSTANCES: The union grieves for time off or compensation at premium rates for worked time resulting from short notice (or no notice) schedule changes. The employer argues that it has not violated the collective agreement since it posts work schedules two weeks in advance and any changes made are done in accordance with past practice - without discrimination and in a fair and reasonable manner.

AWARD: The grievance is dismissed. The employees are only asked to alter the hours of their scheduled shift and have not been asked to work on scheduled days off. This is not a violation of the collective agreement. No reimbursement for time is ordered since this is not a call out situation.

DECISION 87-2

Hawker Siddley Canada Inc. Trenton Works Division **AND** United Steelworkers of America, Local 1231

J.A. MacLellan, Arbitrator

Robert Young, for the Union
Bruce MacIntosh, for the Employer
January 2, 1987

ISSUES: Discipline and Discharge - Grounds For - Attitude 7:3660, Grounds For - Refusal to Obey Instructions 7:3610, 7:3612, Work Performance - Carelessness 7:3510, 7:3520; Disciplinary Penalties - Mitigating Factors - Employee's State of Mind - Inadequate Instructions 7:3520, 7:3530, Insubordination 7:3612, Mitigating Factors 7:4400; Remedies - Type of Grievance - Discharge or Suspension 2:1421.

CIRCUMSTANCES: The union grieves on behalf of two employees who have been suspended. The employer alleges the grievors disobeyed direct orders and that the quality of their work was unacceptable. In addition, the employer alleges the grievors used insubordinate and abusive language. The grievors argue that they were given conflicting work orders and that extenuating circumstances such as bad weather prevented the job from being completed on time. They seek compensation for the two days of their suspension.

AWARD: The grievances succeed. The employer is found not to have substantiated its charges. The grievors did not deliberately disobey direct orders and the amount of work performed by them was reasonable. The suspensions are to be struck from the grievors' work records and they are to be reimbursed for lost wages during the period of suspension.

DECISION 87-3

Enheat Incorporated AND United Steelworkers of America, Local 6874

J.A. MacLellan, Arbitrator

Robert Young, for the Union
Peter MacLellan, for the Employer
January 2, 1987

ISSUES: Fairness - Vacancy - Filling 6:3000; Good Faith - Skill and Ability 6:3100; Seniority 6:0000, Applications 6:2000, Vacancy 5:2510; Skill and Ability - Criteria of Ability and Qualifications 6:3300, Aptitude 6:3330

CIRCUMSTANCES: The grievor claims she was treated unfairly and discriminated against when she was turned down for a vacant position. She also had more seniority than the successful candidate. The grievor requests that she be awarded the position and reimbursed for lost wages. The employer contends that it had acted fairly and reasonably in assessing each candidate's skills and ability for filling the vacant position. The grievor was not selected because of a lack of relevant experience and the requirement that she have a longer training period than the successful candidate.

AWARD: The grievance is dismissed. The employer acted in a fair and reasonable manner in assessing the grievor's qualifications. Further, the employer informed the grievor why she was not selected, and then promoted her to a different position which will provide her with relevant experience should another vacancy (like the one in dispute) open up.

DECISION 87-4

Maritime Telegraph and Telephone Company, Limited AND Atlantic Communications and Technical Workers Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the Union
Terry L. Roane, for the Employer
January 2, 1987

ISSUES: Discipline and Discharge - Grounds For 7:3000, Falsification of Records 7:3322; Disciplinary Penalties 7:4000, Disciplinary Record 7:4310, Mitigating Factors 7:4400; Company Rules - Penalty 7:4100

CIRCUMSTANCES: The Union claims that the grievor was discharged without proper and sufficient cause. The grievor contends he did not intentionally defraud the employer, but owing to mitigating circumstances, an error was made in his time sheet report. The grievor requests that his dismissal be rescinded and that he receive a lesser penalty. The employer charges that the grievor deliberately falsified the time sheet in an effort to receive pay for time not worked. This, it contends, is a form of theft. The employer also argues that the grievor has destroyed the trust relationship with this incident, and that his disciplinary record over the past two years further justifies its lack of trust in the grievor.

AWARD: The grievance fails. The employer is justified in dismissing the grievor for falsifying his time records. The grievor's dismissal is upheld for his failure to report time worked accurately. The grievor's excuses were found to indicate an intent to defraud, rather than mere sloppiness. The penalty of dismissal is seen as just. Mitigating circumstances are not found to be exceptional.

AUTHORITIES: Re Outboard Marine Corp. of Canada and United Steelworkers, Local 5009 (1973), 4 L.A.C. (2d) 82 (Reville); Re Eastern Provincial Airways (1963) Ltd. and Canadian Air Line Employees' Association (1979), 24 L.A.C. (2d) 31 (Barry); Brown and Beatty. Canadian Labour Arbitration 2nd. ed., pp.386-391; Re United Automobile Workers, Local 200, and Ford Motor Company of Canada Ltd. (1970), 22 L.A.C. 35 (Weatherill); Re Canadian Broadcasting Corporation and Canadian Union of Public Employees (1979), 23 L.A.C. (2d) 227 (Arthurs); Re Carling O'Keefe Breweries of Canada Ltd. and Canadian Union of United Brewery Workers, Local 325 (1982), 6 L.A.C. (3d) 412 (McLaren).

DECISION 87-5

Moirs Plant, Nabisco Brands Limited AND The Bakery, Confectionery and Tobacco Workers International Union, Local 446

J.A. MacLellan, Chairman; Rick Clarke, Eric Durnford

Rene Quigley, for the Union
John Plowman, for the Employer
January 15, 1986 [sic] (1987)

ISSUES: Company Rules 4:1500, Fairness 4:2300, Personal Appearance 7:3550, Reasonableness 4:2300; Management Rights 4:2300, 5:0000, Fairness 4:2300

CIRCUMSTANCES: The Union files a grievance requesting that a new company policy prohibiting the wearing of jewelry (except Medic Alert neck chains) be amended to permit some jewelry to be worn by workers in designated areas. The employer contends that the policy merely replaces an earlier one in order to have it conform more closely to current legislation and standards for the industry.

AWARD: The grievance fails. The employer's decision to prohibit jewelry is reasonable and is supported by provisions in the Food and Drug Act. However, the employer should have consulted the union before implementing the revised policy to insure good labour relations.

AUTHORITIES: The Food and Drug Act, section 7.

DECISION 87-6

Civil Service Commission AND Nova Scotia Government Employees Union

Bruce Outhouse, arbitrator

Gorden Forsyth, for the Union
Jonathan Davies, for the Employer
January 16, 1987

ISSUES: Discipline and Discharge - Grounds for - Work Performance-Culpable Incompetence 7:3510, Unsuitability 7:3530, Warning - Warning as Discipline 7:4210; Disciplinary Penalties-Culminating Incident 7:4310; Professional Employees - Standard of Conduct 7:3520; Remedies - Types of Remedy - Reinstatement 2:1470; Termination - Wrongful Dismissal 7:1000

CIRCUMSTANCES: The union alleges that the grievor was discharged without just and sufficient cause. It does not dispute the events or procedures throughout the history of the case, but the union does contend that there was no culminating incident to trigger dismissal, and therefore the grievance should be allowed. The employer alleges that the grievor is incompetent and that there were justifiable circumstances, and evidence in his employment record, to justify dismissal. The employer contends it has acted fairly and reasonably by informing the grievor of its expectations for job performance. After repeated warnings and disciplinary action the employer contends it is entitled to invoke the culminating incident doctrine.

AWARD: The grievance is allowed with jurisdiction retained (if necessary) concerning the amount of compensation. The grievor is to be reinstated to his former position without loss of seniority or other benefits. The employer proceeded cautiously in documenting its case against the grievor up to the point of the alleged culminating incident. The evidence does not indicate "that the grievor was guilty of any misconduct which warranted formal discipline." The grievor does not start with a clean slate, and the employer should establish detailed work plans in order to objectively measure the grievor's future work performance.

AUTHORITIES: Toronto East General and Orthopaedic Hospital Inc. and Ontario Public Service Employees Union, Local 576 (1979), 21 L.A.C. (2d) 296 (Kennedy); Re Government of Province of Saskatchewan and Saskatchewan Government Employees' Association (1975), 11 L.A.C. (2d) 244 (Barclay); Re Canadian Airline Employees Association and Air Canada (1969), 21 L.A.C. 23 (Palmer); Re Ahmad and Appeal Board Established by the Public Service Commission (1974), 51 D.L.R. (3d) 470 (F.C.A.); Re City of Toronto Planning Board and Canadian Union of Public Employees, Local 79 (December 15th, 1976), unreported (Burkett).

DECISION 87-7 *

Dartmouth District School Board **AND** Nova Scotia Teachers Union

R. Lorne MacDougall, Arbitrator

Ronald J. Downie, for the Union
Michael H. Moreash, for the Employer
January 19, 1987

ISSUES: Seniority 6:0000, Acquisition 6:1100, Applications 6:2000; Skill and Ability 6:3000, Arbitral Review 6:3100, Senior Employee if Relatively Equal 6:3220, Criteria of Ability and Qualifications 6:3300; Recall - Seniority 6:2000; Remedies-Authority to Award - Retaining Jurisdiction 2:1400

CIRCUMSTANCES: The Union files a grievance on behalf of two members who claim that their seniority rights were denied when the employer hired two other people with less seniority for two, one year contract positions. The union argues that the new collective agreement does not distinguish between categories of teachers and their rights of recall; all teachers are lumped together with rights of recall and retention, although each category has its own seniority list. The union claims seniority is the most important criterion in the agreement. The employer contends that it has the right to fill one-year contract positions without constraint. Sections of the collective agreement referring to assessment (or retention) and procedures do not apply in this case.

AWARD: One grievance succeeds, one fails.
1. There is a difference in seniority between the grievors and one incumbent, with experience and qualifications equal in this case. Therefore this grievance succeeds in favour of the grievor holding the most seniority. Jurisdiction is retained with respect to remedy only.
2. The second grievance fails since the second incumbent has sufficiently greater experience which outweighs her lack of seniority. Both grievors fail in terms of this contested position.

*See appeal decision: 87-81

DECISION 87-8

Nova Concrete Contracting Limited AND Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 216

William H. Kydd, Arbitrator

Bill Boudreau, for the Union
January 15, 1987

ISSUES: Union - Security - Check Off 9:1200, Remedies - Damages 2:1426; Remedies - Union Security - Damages 2:1426

CIRCUMSTANCES: The union's argues that the employer violated a provision of the collective agreement in which the employer agreed to hire unionized employees only. The employer has hired two employees who were approached to become union members but had not yet done so. The employer has not requested union workmen for this site. The union claims damages for lost wages, vacation pay and benefits for two workmen. No one appeared to present a case on behalf on the employer.

AWARD: The grievance succeeds and the employer is ordered to pay the stipulated sum for breaking the "preferential clause in the collective agreement by hiring non-union men."

AUTHORITIES: Boulin Drywall Contractors Limited (1975) 8 O.R. (2d) 103; Arbitration Act, section 14.

DECISION 87-9

Hermes Electronics Limited AND Int'l Brotherhood of Electrical Workers, Local 1651

J.A. MacLellan, chairman; John Plowman, Carl Simpson

Ronald Pink, for the union
Peter McLellan, for the employer
January 15, 1987
February 2, 1987 (dissent)

ISSUES: Discipline and Discharge - Refusal to Obey Instructions 7:3610, 7:3612; Disciplinary Penalties 7:4000 - Employees State of Mind 7:4424, Insubordination 7:3612; Evidence - Types of Evidence - Past Practice 3:4430; Remedies - Type of Grievance-Discharge or Suspension 2:1421

CIRCUMSTANCES: The union contends that the grievor was unjustly discharged for an alleged incident of insubordination. The employer states that the grievor willfully disobeyed direct instructions and was insubordinate which results in immediate dismissal under the terms of the collective agreement.

AWARD: The grievance succeeds and the grievor is reinstated with full benefits. The Board retains jurisdiction if the parties cannot agree on the amount of remuneration. The employer did not clearly establish that the grievor understood the employer's orders and therefore insubordination is not proved - especially when consideration is given to past practice in the workplace.

DISSENT: (Plowman) The grievor was insubordinate and for a "major offence" of this type, dismissal is justified. This position is further supported by the grievor's attitude and employment history.

DECISION 87-10

Pictou District School Board AND Canadian Union of Public Employees, Local 867

J.A. MacLellan, Chairman; Eric Durnford, Michael Tynes

Blaise MacDonald, for the Union
Bruce MacIntosh, for the Employer
February 3, 1987

ISSUES: Discipline and Discharge - Grounds for - Carelessness 7:3520, Damage to Employer's Property 7:3410; Disciplinary Penalties - Mitigating Factors 7:4400, Apology 7:4422, Types of Penalty - Demotion or Transfer 7:3520, 7:3544; Evidence 3:3000, Burden, Weight of - Discipline Cases 7:2500; Promotion, Demotion and Transfer - Burden of Proof 7:2300

CIRCUMSTANCES: The union alleges that the grievor was unjustly disciplined, demoted and transferred out of his position and classification following actions during a strike. The grievor requests reinstatement to his former position with no loss of benefits, seniority or wages, and that all references to the alleged incident be removed from his file. The employer contends that the grievor's actions constituted a serious breach of trust which instead could have resulted in his dismissal.

AWARD: The grievance succeeds in part. The grievor is entitled to be reconsidered for reinstatement to his former position at the end of the current school year. Jurisdiction is retained to resolve any outstanding issues at that time. The reinstatement will not involve any bumping. The grievor was careless in his actions and the employer was justified in disciplining him. The incident giving rise to the demotion must not influence or play any part in the consideration of reinstatement.

DECISION 87-11

Milano Electric (1981) Limited AND The International Brotherhood of Electrical Workers, Local Union No. 625

Douglas G. Ruck, Arbitrator

Ronald Pink, for the Union
Fred P. Crooks, for the Employer
February 2, 1987

ISSUES: Management Rights 4:2300, 5:0000; Work Assignment 5:1000, Contracting Out 5:1300; Union Security - Checkoff 9:1200

CIRCUMSTANCES: The union contends that the employer refused a contract which resulted in loss of work for union members. In addition, they allege that the employer was discriminatory since the employer had specified who was to be hired. The employer states that it never contracted to perform the work in question. They contend that they had a contract for other work done at the site and that they recommended an independent contractor (and former employee) for the job. They deny insisting that the independent be hired by the union for the work.

AWARD: The grievance is dismissed. The contract in question was never accepted by the employer. The union cannot expect the employer to accept work it does not want since it is the employer and therefore has the right to direct its own operations.

AUTHORITIES: Trade Union Act 41(1)(e), 51(3)(a)(i), 51(3)(e); Regina v. Bushnell Communications Ltd et al., (1974) 47 D.L.R. (3d) 668; Re J.M.L.Shirts Ltd. and Industrial Relations Board (1977) 78 C.L.L.C. 31; Peter McIntyre and Unsen Fisheries Limited, 1976 L.R.B. Order No. 2319; Re Inglis Ltd. and United Steelworkers, Local 4487, (1978) 17 L.A.C. (2d) 380.

DECISION 87-12

Markland Associates Limited AND Sheet Metal Workers' International Association, Local 409

S. Bruce Outhouse, Arbitrator

N. Blaise MacDonald, for the Union
Terry L. Roane, for the Employer
February 4, 1987

ISSUES: Arbitrability - Agreement as Primary Source of Jurisdiction 2:1100, Agreement Expired 4:1620, Matters Arising Outside of Agreement 2:1200, Existence of Collective Agreement 4:1000; Bargaining Unit - Definition 5:1100; Union - Recognition 9:1100; Work Assignment - Contracting Out 5:1300; Contracting Out 5:1300, 5:0000; Estoppel - Procedural Irregularities Not Objected To 2:3130; Evidence - Types of Evidence - Extrinsic Evidence-Prior Agreements 4:1200, 4:2250; Interpretation - Aids to Interpretation 4:2200, Ancillary Documents 4:1200; Management Rights 4:2300; Grievance - Continuing Grievance 2:3128.

CIRCUMSTANCES: The union alleges that the employer has violated the collective agreement by contracting out for non-union workers. The union agrees that the collective agreement was not in place at the time, but a voluntary recognition agreement had been filed and the Construction Bureau contract also applied. The union contends that the employer voluntarily agreed to its obligations, and that it is now taking advantage of a technicality to evade its responsibilities. The union views this as a continuing grievance and seeks damages for lost work. The employer contends that there is no valid collective agreement for the time period in question, and therefore there is no jurisdiction over the case. In addition, the employer rejects jurisdiction based on the voluntary recognition agreement because it does not comply with statutory requirements and was not filed at the time of the incident. The union contends that its failure to file should be viewed as an 'irregularity' permitted under the Act. Further, the employer claims it has not violated the Construction Bureau contract because there are no provisions prohibiting unionized employers from assigning contracts.

AWARD: The grievance fails. The "requisite jurisdiction" to determine the merits of the grievance are lacking. In the absence of either a certification order or voluntary recognition agreement, the union does not have the status or right to enforce the Bureau contract against the employer through the arbitration process. The union's claim that this is a continuing grievance is rejected.

AUTHORITIES: Trade Union Act, S.N.S., 1972, c.19, as amended; Arbitration Act, R.S.N.S., 1967, c.12, as amended; Re Blouin Drywall Contractors Limited and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1973) 4 L.A.C. (2d) 254 (O'Shea); Brown and Beatty. Canadian Labour Arbitration. 2nd ed. p.96; Construction Association Management Labour Bureau Limited v.Carey Brothers Masonry Limited (1986), 74 N.S.R. (2d) 369 (N.S.S.C., A.D.); Mod-lok Installations Limited v. Cana Construction Company Limited et al (1984), 10 C.L.R. 195 (B.C.S.C.); Re United Brotherhood of Carpenters and Joiners of America, Local Union 1669 and the Ontario Provincial Council of Carpenters v. Kapuskasing Board of Education [1981] O.L.R.B.R. 300; Re City of Halifax and Halifax Civic Workers, Local Union no. 198 (January 25th, 1984), unreported (Downie); Re International Brotherhood of Electrical Workers, Local 265 and Western Electric Limited (February 8th, 1983), unreported (DeMont); Southern Electric Limited v. International Brotherhood of Electrical Workers, Local 625 et al (1984), 66 N.S.R. (2d) 159 (N.S.S.C.,T.D.); Re L.J.Casavechia Contracting Limited and International Union of Operating Engineers, Local 721 (July 28th, 1986), unreported (N.S.L.R.B. file no. 916); Re International Brotherhood of Electrical Workers, Local 625 and Quest Electrical Limited et al (November 13th, 1986), unreported (N.S.L.R.B., file no. 972c); International Brotherhood of Electrical Workers, Local no. 625 and Rocca Construction Limited (January 17th, 1978), unreported (Green); Underground Services (1983) Limited and the Labourers' International Union of North America, Local 615 (May 21st., 1986), unreported (MacDougall).

DECISION 87-13

The Cove Guest Home AND Canadian Brotherhood of Railway, Transport and General Workers, Local 620

J. Bernard Boudreau, Arbitrator

January 27, 1987

ISSUES: Illness or Disability - Effect on Employee - Absence from Work 7:3110, 7:3112, Employer Response - Alternatives to Termination - Absenteeism 7:3200, 7:3210, 7:3220, 7:3240; Evidence - Burden of Proof - Illness 7:3240, Innocent Absenteeism 7:3210; Probationary Employee - Discipline 7:5020; Remedies-Types of Remedy - Damages - Measure 2:1410

CIRCUMSTANCES: The grievor, hired as an on-call, part time casual worker, was terminated during her probationary period owing to 'poor attendance'. She contends that her absences were due to illness, and denies ever telling the employer that she was unsure about when she might return to work. The grievor has since been rehired, but grieves the circumstances of her earlier dismissal. The employer acknowledges that the grievor was a satisfactory worker but contends that her absentee rate was unacceptable. Therefore she was dismissed under the 'just cause' terms of the collective agreement.

AWARD: The grievance succeeds. The grievor was terminated without just cause. Since she has already been rehired, it is not necessary for her reinstatement to be ordered. However, her seniority is to be amended to reflect the original date of employment. No compensation is granted for the time not worked.

AUTHORITIES: Brown and Beatty. Canadian Labour Arbitration 2nd ed., p.62.

DECISION 87-14

City of Halifax AND Halifax Civic Workers' Union, Local 108

Bruce Outhouse, Chair; Joseph Ross, Ronald Downie

Bruce Evans, for the Union
Gerald Goneau, for the Employer
January 8, 1987
January 29, 1987 (Dissent)

ISSUES: Time Limits - Waiver 2:3130; Illness or Disability-Burden of Proof - Employer Allegations 7:3250, Effect on Employee - Ability to Do Job 7:3220, Medical Examinations 7:3220, 7:3230, 7:3250; Remedies - Type of Grievance 2:1421, Types of Remedy-

Reinstatement 2:1470

CIRCUMSTANCES: The union contends that the grievor was unjustly dismissed for a medical disability resulting from a work-related injury. It claims that the employer has not proven that the disability is so severe as to be a burden to the employer or to the grievor's fellow workers. The union argues that past disciplinary and attendance records are not an issue in the case. The grievor is seeking reinstatement, or to be placed on layoff in order to claim any other job in the bargaining unit. The employer claims that the medical evidence clearly supports their decision to dismiss the grievor. In terms of operational efficiency, the grievor limits the employer's flexibility for work assignments. The employer also refers to the grievor's past attendance and disciplinary records which indicate the grievor is not worthy of a trust position, and therefore cannot be transferred to a physically less demanding position. The employer raised objections pertaining to time limits for filing this grievance.

AWARD: The grievance is allowed. The grievor is reinstated to his former position without loss of seniority. He is also to be compensated for lost earnings with jurisdiction retained if the parties cannot agree upon an amount. The employer's objections to time limit restrictions for filing the grievance are dismissed. In addition, the employer is not under any restrictions concerning the type of duties the grievor may be assigned.

DISSENT: (Downie) The grievor must be able to perform all portions of his job - not just a "truly substantial portion". The employer was justified in dismissal of the grievor on medical grounds.

AUTHORITIES: Re Regency Towers Hotel Ltd and Hotel and Club Employees' Union, Local 299 (1973), 4 L.A.C. (2d) 440 (Schiff); Re Corporation of the City of Vanier v. Canadian Union of Public Employees, Local 954 (1976), 77 C.L.L.C 37 (Ont. Div.C.); Brown and Beatty. Canadian Labour Arbitration 2nd. ed.pp.98-100, 324-26, 366-386; Re Parking Authority of Toronto and Canadian Union of Public Employees, Local 43 (1974), 5 L.A.C. (2d) 150 (Adell); Re Domtar Packaging Ltd. and Retail, Wholesale & Department Store Union, Local 414 (1976), 12 L.A.C. (2d) 378 (O'Shea); Re Canadian Safety Fuse Co. Ltd. and International Union of District 50, Allied and Technical Workers, Local 14132 (1973), 3 L.A.C. (2d) 77 (Moalli); Re Corporation of the City of Brampton and Amalgamated Transit Union, Local 1573 (1978), 20 L.A.C. (2d) 12 (O'Connor); Re Aro Canada Ltd. and International Association of Machinists, Lodge 1817 (1975), 10 L.A.C. (2d) 81 (Beatty); Re Oil, Chemical & Atomic Workers, Local 9-672, and Dow Chemical of Canada Ltd. (1970), 22 L.A.C. 50 (Weatherill); Re Radio Shack Division, Tandy Electronics Ltd and United Steelworkers (1980), 27 L.A.C. (2d) 221 (Carter); Re Borough of Scarborough and Scarborough Professional Fire Fighters' Association, Local 626 I.A.F.F. (1977), 15 L.A.C. (2d) 71 (Burkett).

DECISION 87-15

Maritime Telegraph and Telephone Company, Limited AND Atlantic Communications and Technical Workers' Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the Union
Gregory I. North, for the Employer
February 5, 1987

ISSUES: Management Rights 5:0000, Classification 5:2200, Revision of Job Content 5:2200; Job Classifications and Descriptions-Creation or Revision 5:2000, 5:2200; Decisions of Other Boards of Arbitration - Applications - Precedential Value 1:3000

CIRCUMSTANCES: The union claims that by assigning work from one classification to workers in another classification, the employer violated sections of the collective agreement dealing with definitions of work classifications. It seeks a declaration that the employer is in breach of the agreement and an order that it cease and desist. The employer admits that this assigning of work occurs, but argues that doing so is within its management rights. Moreover, it contends that the collective agreement does not prohibit deleting or reassigning a task between classifications. The employer argues that job content of the classifications are not frozen, but can be amended to meet the needs of the employer.

AWARD: The grievance fails. There are no restrictions in the collective agreement prohibiting the employer from reassigning job duties from one classification to another.

AUTHORITIES: Re United Steelworkers and Algoma Steel Corp. (1968), 19 L.A.C. 236 (Weiler); Re Retail, Wholesale Bakery & Confectionery Workers, Local 461, and Canada Bread Co. Ltd. (1965), 16 L.A.C. 202 (Reville); Re International Brotherhood of Electrical Workers, Local Union 1030 and Maritime Telegraph and Telephone Company, Limited (February 12th, 1976), unreported (Green); Brown and Beatty. Canadian Labour Arbitration 2nd. ed. pp.224-25.

DECISION 87-16

Atlantic Concrete Finishers AND Labourers International Union, Local 1115

J. Bernard Boudreau, Arbitrator

Frank Elman, for the Union
Norman Brotzel, for the Employer
February 11, 1987

ISSUES: Union - Security - Check-Off 9:1200; Remedies - Type of Remedy - Compliance Order 2:1450; Bargaining Unit - All Employee Unit 5:1100, Employees Excluded 5:1120, 5:1122

CIRCUMSTANCES: A policy grievance is filed by the union, contending that the employer has been collecting dues from union members without forwarding deductions to the union. In addition, the employer has failed to deduct dues for two relatives who are part of the bargaining unit and who perform bargaining unit work. The union requests the dues be paid and that a declaration be issued requiring the employer to withhold dues for all workers covered by the collective agreement. The employer acknowledges withholding dues from the union but alleges that the two relatives are part owners of the company and therefore exempt from collective agreement provisions. The employer indicates a willingness to pay once this issue is defined.

AWARD: The grievance succeeds. The employer has failed to provide evidence that the two employees in question are partners in the business. The employer is directed to forward all union deductions to the union. In addition, the employer is to make deductions from all employees covered under the collective agreement and who perform bargaining unit work.

DECISION 87-17

The Town of Sydney Mines AND Canadian Union of Public Employees, The Sydney Mines Police, Local Union No. 2947

Charles O'Connell, Arbitrator

David L. Parsons, for the Union
William P. Burchell, for the Employer
February 12, 1987

ISSUES: Overtime - Premium - Holiday Pay 8:3140; Statutory Holidays - Holiday Pay and Other Benefits 8:3140, Work on Day of Holiday 8:3130, Day Defined 4:2100, Holiday Falling on Non-Working Day 8:3110; Interpretation - Aids to Interpretation-Past Practice 2:2220; Time Limits - Delay 2:3210; Working Hours and Shifts - Definition of - Work Day Defined 4:2100, Work Week Defined 4:2100

CIRCUMSTANCES: The union contends that the employer has violated the statutory holiday clause of the collective agreement. The union asks for employees to be paid at the double time rate for holidays worked and the compensation to be retroactive to Victoria Day. The employer contends that the grievance should be dismissed because of a delay in filing and processing. In addition, based on past practice, the employer argues that there has been no violation of the collective agreement.

AWARD: The grievance succeeds. The union is awarded pay for statutory holidays with the arbitrator clarifying the meaning of straight time and double time in determining the amount of time the pay is to be based on. The employer's claim that the grievance was not filed on time is dismissed. If the employer objected, it should have complained at the first step in the grievance procedure. Past practice is disregarded since the collective agreement is not seen as ambiguous.

DECISION 87-18

Halifax County Bedford District School Board AND The Union of School Board Employees

R. Lorne MacDougall, Chair; Donald H. McDougall, Rene Quigley

Bruce Evans, for the Union
Eric B. Durnford, for the Employer
January 12, 1987

ISSUES: Illness or Disability - Effect on Employee - Absence from Work 7:3100, 7:3110, 7:3112, Employer Response - Alternatives to Termination - Absenteeism 7:3200, 7:3210, 7:3220, 7:3240; Evidence - Burden of Proof - Applications - Illness 7:3250, Innocent Absenteeism 7:3210

CIRCUMSTANCES: The union contends that the grievor was dismissed unjustly, and without due consideration of the grievor's medical condition. The grievor seeks to be put on lay-off until a half-time position more suited to his physical limitations is available. The employer argues that it has taken due consideration of the grievor's condition, but it is justified in dismissing him in view of his record of unacceptable, excessive absenteeism. In addition, the grievor has demonstrated a poor attitude.

AWARD: The grievance fails. The dismissal was just since the grievor did not act responsibly and there is no assurance that his medical condition will become more manageable as not to affect work performance, or that his attitude will improve.

DISSENT: (Quigley) The employer should have acted with greater sympathy in this case and counselled the grievor in ways to reach a beneficial accommodation for all concerned. The grievor should

be awarded a half-time position.
AUTHORITIES: Canadian Union of Postal Workers and Canada Post Corporation (January 22, 1986) unreported (Outhouse).

DECISION 87-19

Enheat Inc., Aircraft Division AND United Steelworkers of America, Local 4883

R. Lorne MacDougall, Arbitrator

Robert (Bob) Young, for the Union
Peter McLellan, for the Employer
February 12, 1987

ISSUES: Overtime 5:3200, Call-In Pay 8:3410; Wages - Overtime Pay 8:2100, Call-In Pay 8:3410; Interpretation - Intention of the Parties 4:2100; Call-In Pay 8:3400, Overtime Rates 8:2140

CIRCUMSTANCES: The grievor alleges that he was not remunerated in accordance with provisions of the collective agreement covering the unscheduled overtime work he was called in to perform during vacation time. The employer contends that past practice has been to re-schedule vacation time to a later date rather than pay at a premium rate. The issue in this case is not one of "call-in" since the employee voluntarily agreed to work and his worked time does not follow "completion of his normal shift" as required for overtime under the terms of the collective agreement.

AWARD: The grievance succeeds and the grievor is awarded compensation for "unscheduled overtime" at the rate specified in the collective agreement. The employer's claim that the work performed was unscheduled 'regular time' was disallowed.

AUTHORITIES: Palmer. Collective Agreement Arbitration in Canada, 2nd. ed. pp.652-53; Brown and Beatty. Canadian Labour Arbitration. 2nd ed. pp.614-15; Re Shell Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-848, (1974), 6 L.A.C. (2d) 422 at page 429 (O'Shea)

DECISION 87-20

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the Union

William M. Wilson, for the Employer
January 29, 1987

ISSUES: Award of Board of Arbitration - Binding Effect 2:3220; Continuing Grievance 2:3128; Decisions of Other Boards of Arbitration - Applications - Aid to Interpretation 4:2220; Evidence - Types of Evidence - Extrinsic Evidence - Past Practice 3:4430; Interpretation - Intention of the Parties 4:2100; Job Classifications and Descriptions - Creation or Revision - Change of Work Load/Job Function 5:2410; Time Limits - Continuing Grievance 2:3128, Mandatory or Directory 2:3128; Wages - Change in Job Function 5:2410; Work Assignment 5:1000, Changes in Job Function 5:2410; Management Rights 4:2300

CIRCUMSTANCES: The union claims that the employer violated the collective agreement by refusing the grievor 'acting pay' compensation for performing the principal duties of a higher position left open by retirement. In the past the grievor has received 'acting pay'. The union argues this is a continuing grievance and requests 'acting pay' compensation until the higher position is officially filled, or until the grievor no longer performs the bulk of this job. The employer argues that the time limits for filing the grievance were not followed. It also claims the grievor is not entitled to 'acting pay' because he was not designated to perform the specified duties. In addition, it argues that the grievor's job description requires him to substitute periodically in this capacity, which thus disqualifies him from 'acting pay' compensation. The employer also contends that if the grievor were to qualify for 'acting pay', the work at the higher position must be within the same bargaining unit as the grievor.

AWARD: The grievance succeeds. The grievor is entitled to acting pay for the time period requested and he is to continue to receive 'acting pay' assuming there is no substantial change in his duties. Jurisdiction is retained if the parties cannot agree on the amount of compensation. The employer's claim that 'acting pay' for work in higher positions can occur only when those positions are within the same bargaining unit is dismissed since the intention of the parties in the collective agreement was to provide equitable wage treatment, and not to restrict or exclude employees from qualifying for 'acting pay'. Time limit objections were also dismissed, and the grievance is seen as a continuing one.

AUTHORITIES: N.S.G.E.U. on behalf of Ellen Morrison and Civil Service Commission (March 20th, 1985), unreported (Darby); N.S.G.E.U. on behalf of Murdock Rudderham and Civil Service Commission (April 19th, 1985), unreported (Darby); Re N.S.G.E.U. on behalf of Donald King and Craig Morgan and Civil Service Commission (June 27th, 1983), unreported (Outhouse); Re The Crown in Right of Nova Scotia and Nova Scotia Government Employees

Union on behalf of Edward Milligan and Paul Therrio (1985), 21 L.A.C. (3d) 35 (Darby); Re United Steelworkers, Local 7105 and Automatic Screw Machine Products Limited (1972), 23 L.A.C. 296 (Johnston); Re United Automobile Workers and National Auto Radiator Manufacturing Company (1967), 18 L.A.C. 326 (Palmer); Re United Electrical, Radio and Machine Workers of America, and Canadian General Electric Company (1952), 3 L.A.C. 980 (Laskin); Re Union Gas Company of Canada Limited and International Chemical Workers, Local 741 (1972), 2 L.A.C. (2d) 45 (Weatherill); Brown and Beatty. Canadian Labour Arbitration. (1984), 2nd. ed., pp. 95-6, 105; Re Sudbury Mine, Mill and Smelter Workers' Union and Falconbridge Nickel Mines Ltd. (1969), 20 L.A.C. 45 (Weiler); Re N.S.G.E.U. on behalf of Sherry MacPherson, Irving Deal and Martha Brown and Civil Service Commission (January 15th, 1986), unreported, pp.57-8 (Outhouse).

DECISION 87-21

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the Union
William M. Wilson, for the Employer
February 2, 1987

ISSUES: Decisions of Other Boards of Arbitration - Applications- Aids to Interpretation 4:2220; Evidence - Types of Evidence- Extrinsic Evidence - Past Practice 3:4430; Interpretation 4:2100, 4:2300, Aids to Interpretation - Dictionaries 4:2210, Intention of the Parties 4:2100; Job Classifications and Descriptions- Creation or Revision - Change of Work Load/Job Function 5:2410; Wages - Change in Job Function 5:2410; Work Assignment 5:1000, Changes in Job Function 5:2410; Management Rights 4:2300

CIRCUMSTANCES: The union argues that the grievor is entitled to acting pay for performing duties of a higher position while the incumbent was absent due to illness. The union contends that the grievor qualifies for acting pay because this is not a regularly recurring, periodic substitution such as might occur during an annual leave. The union also asserts that the employer has granted acting pay in the past in similar circumstances. The employer argues that periodic substitution in a higher position is part of the grievor's job description, and therefore he is not entitled to acting pay.

AWARD: The grievance fails. The grievor is normally required to fill the higher position. Thus the case is found to be one of periodic substitution as defined in the collective agreement, and therefore the employee is not entitled to acting pay. This is not a case of non-periodic substitution where the employee is asked to perform the work of a higher position for an extended period or for on an indefinite basis.

AUTHORITIES: Veliotis v. the Queen [1974] C.T.C. 237 (F.C.T.D.) and The Queen v. Guay [1975] C.T.C. 88 (F.C.T.D.); Re NSGEU on behalf of Ellen Morrison and Civil Service Commission (March 20th, 1985), unreported (Darby); Re NSGEU on behalf of Murdock Rudderham and Civil Service Commission (April 19th, 1985), unreported (Darby); Re NSGEU on behalf of Sherry MacPherson, Irving Deal and Martha Brown and Civil Service Commission (January 15th, 1986), unreported, at pp. 57-58 (Outhouse); Re NSGEU on behalf of Hulbert Anthony and Civil Service Commission (January 29th, 1987), unreported, pp.29-30 (Outhouse); Re Government of the Province of British Columbia and British Columbia Government Employees Union (1981), 5 W.L.A.C. 295 (Larson), pp.304-05

DECISION 87-22

J. Whally Construction Limited AND Local 1392 of the United Brotherhood of Carpenters and Joiners of America

William H. Kydd, Arbitrator

Ronald Pink, for the Union
James W. Whally, for the Employer
February 20, 1987

ISSUES: Remedies - Union Security - Damages 2:1426, Work Assignment Outside Unit 2:1424, 5:1500; Bargaining Unit-Contracting Out of 5:1300; Decisions of Other Boards of Arbitration - Applications - Aids to Interpretation 4:2220; Union - Grievance - Damages for Violation of Union Security 9:1200, Security - Remedies - Damages 2:1426

CIRCUMSTANCES: The union claims that the employer hired non-union workers in violation of the collective agreement in effect with the Construction Association Management Bureau Limited. The union argues that the employer, the employer's son and others have completed work on weekends but that members of the bargaining unit were not asked to work overtime. The union asks for lost wages and damages for this breach of union security. The employer claims that it asked for, and received permission for one non-bargaining unit worker to perform union work with the understanding that dues would be paid for that worker. The employer acknowledges that his son worked at the site, but states that he himself only helped out at the site which he feels is his right to do when the work is behind schedule. In addition, he only hired other non-union workers when union workers refused overtime.

AWARD: The grievance succeeds. The union is awarded damages equal to the total wages lost to union members. The employer is seen to have worked at the site, rather than simply being a helper. His wage equivalent is to be included in the award. The award does not attempt to include lost wages for scheduled work performed by the one non-union worker who the employer claimed to have permission to have hired.

AUTHORITIES: Labourers International Union and Brotherhood of Carpenters v. Landing Construction Limited et. al, S.C.A. 01473; Re Blouin Drywall Contractors Limited and the United Brotherhood of Carpenters and Joiners of America, Local 246 (1975), 57 T.L.R. (3d) 199; United Brotherhood of Carpenters and Joiners and McDougall Construction Limited (December 6, 1982), unreported (Kelly), p.14

DECISION 87-23

Berwick Bakery Limited AND Bakery, Confectionery and Tobacco Workers International Union, Local 446

Milton J. Veniot, Chair; William Lemmon, Robert Cook

Rene Quigley, for the Union
Matthew MacPherson, for the Employer
February 20, 1987

ISSUES: Discipline and Discharge - Grounds For - Theft 7:3310, 7:3312, 7:3314, Prior Record 7:4310, 7:4314; Disciplinary Penalties - Mitigating Factors 7:4400, Rehabilitative Potential 7:4422; Company Rules 4:1500; Theft 7:3310, Penalty 7:3314

CIRCUMSTANCES: The grievor has been discharged for theft from the employer. The union argues that the grievor was unjustly dismissed since the missing money could easily have resulted from the accounting system used by the employer. In addition, the union contends that the grievor's account did not show a deficit; when a deficit did appear, the employee's practice had been to pay into the account. The employer's reporting and balancing procedures had not been strictly adhered to by all employees. The union seeks the grievor's reinstatement. The employer alleges that the grievor was aware of the rules and procedures, and of the consequences for dealing incorrectly with cash receipts. When the grievor did not report his cash returns, the employer was justified in terminating the grievor's employment.

AWARD: The grievance fails. The grievor was found to have used the employer's money for his own purposes, and then to have filed false accounting records. This action constitutes a breach of trust, and thus justified dismissal. The grievor's actions amounted to theft, whether or not he intended to return the money. The grievor's past employment record is not strong enough to consider mitigating circumstances. The Board does not find the employer's actions to be inconsistent with past practice when dealing with cases of theft. Theft has resulted in dismissal. The employer is urged to consider, in consultation with the union, a voluntary program of rehabilitation for the grievor in order to reestablish a trust relationship.

AUTHORITIES: Criminal Code, Section 238 (1); Brown and Beatty. Canadian Labour Arbitration 2nd. ed. p.386, 392

DECISION 87-24

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the Union
William M. Wilson, for the Employer
February 24, 1987

ISSUES: Wages - Rates for New and Revised Classifications 5:2440; Job Classifications and Descriptions - Creation or Revision 5:2000, 5:2200, 5:2440; Management Rights 4:2300, 5:0000, Wage Rate for New Classification 8:1000; Interpretation - Extrinsic Evidence 4:2250; Evidence - Types of Evidence - Extrinsic Evidence - Prior Agreements 4:2250; Extrinsic Evidence 3:4400; Interest 2:1414; Policy Grievance - Nature of 2:3124; Arbitrability - Settlement of Grievance 2:3230; Remedies - Types of Remedy - Damages - Interest 2:1414, Declaration 2:1450

CIRCUMSTANCES: This is a policy grievance. The union contends the employer has unilaterally altered salary rates for existing classifications by creating new intake levels in the professional bargaining unit. The union argues the employer does not have the right to move positions around in the pay plan merely because the plan does not include job titles. The union seeks a declaration that the employer has violated the collective agreement. They also seek clarification of what constitutes a classification within the context of the collective agreement. The union also seeks interest on retroactive wages for three employees affected by the employer's lower pay rate, and nominal damages on its own behalf for the intentional violation of the agreement.

The employer acknowledges having created an interim classification. Since it had agreed to discontinue the use of such classifications in the 1980 agreement with the union, the employer announced its concession on this aspect of the grievance. The employer indicated that the employees affected had been upgraded to the current classification and corresponding wage level. The employer feels the grievance should not be heard since its actions have rendered the matter moot. In addition, it argues that it has the right to assign positions to the classifications under the collective agreement since the agreement does not name the positions that correspond to the applicable pay plan. The employer argues that in this case, the classifications only refer to the PR designation, but not the actual positions or position titles. The collective agreement does not restrict its right to classify employees.

AWARD: The grievance succeeds in all parts but one. The grievance raises issues about the employer's unilateral right to establish new intake levels for existing classifications. It also goes beyond the interim classification issue and the concessions the employer was willing to make. Therefore the arbitrator rules that he has jurisdiction in the matter. The declaration requested by the union is granted. The use of extrinsic evidence clarifies ambiguities regarding PR designations and pay. Therefore a declaration of what constitutes a classification is found unnecessary. Interest on retroactive wages for the three employees is granted with jurisdiction retained to determine an amount, if necessary. Damages sought by the union are not justified, and therefore are denied.

AUTHORITIES: NSGEU and Civil Service Commission (September 8th, 1986), unreported (Outhouse); Re United Steelworkers and International Nickel Company of Canada Limited (1972), 24 L.A.C. 51 (Weiler); Re Imperial Tobacco Products (Ont.) Limited and Tobacco Workers' International Union, Local 323 (1975), 8 L.A.C. (2d) 388 (Weatherill); Re International Nickel Company of Canada Limited and United Steelworkers, Local 6500 (1975), 9 L.A.C. (2d) 83 (Simmons); Re Canadian Union of Postal Workers and Canada Post Corporation (January 6th, 1983), unreported (Outhouse); Civil Service Act, S.N.S., 1980 c.3, sections 28-29; Re Nova Scotia Government Employees Union on behalf of Donald King and Craig Morgan and Civil Service Commission (March 6th, 1984), unreported (Outhouse); Re NSGEU on behalf of Sherry MacPherson, Irving Deal and Martha Brown and CSC (January 15th, 1986), unreported (Outhouse); Re Windsor Public Utility Commission and International Brotherhood of Electrical Workers, Local 911 (1974), 7 L.A.C. (2d) 380 (Adams); Re NSGEU and CSC (May 6th, 1986), unreported (Outhouse); Re NSGEU and CSC (July 21st, 1986), unreported (Outhouse)

DECISION 87-25

The North Sydney Board of Police Commissioners AND Canadian Union of Public Employees, Local 2353, The North Sydney Police Union

Charles O'Connell, Chair; Gilbert MacIntyre, Matthew Ryan

Blaise MacDonald, for the Union
Bernard Boudreau, for the Employer
March 6, 1987

ISSUES: Seniority - Acquisition 6:1100, Applications 6:2000; Estoppel 2:2200, 2:2210, 2:2220, Delay in Complaining or Grieving 2:3210; Temporary, Casual and Part-Time Employees 5:1124; Contracts of Employment - Collective Bargaining Pre-empts 2:1200, 2:1210; Board of Arbitration Impartiality 3:1100

CIRCUMSTANCES: Preliminary objections were raised by the employer concerning the nature of the grievance.

The union claims that the employer hired a non-union worker while a union member was unemployed. The union seeks compensation for lost wages and that the member be given preference for future available work. The employer contends that the grievor was a part-time worker hired for a six month replacement contract and was not covered under the collective agreement. The grievor was terminated at the end of this contract and therefore seniority issues do not apply to the contested position.

AWARD: The grievance is dismissed. The employer's preliminary objections are dismissed since they waived earlier procedural steps. The grievor knew he was hired for a short term contract and is estopped from claiming any seniority rights.

DISSENT: (MacIntyre) The procedures followed in hearing this case are questioned emphatically, with the recommendation that the union request judicial review. If estoppel is to be considered a factor, then the extensive evidence supports the union's position. The employer did not apply seniority to the part-time list as it had done in the past.

AUTHORITIES: Re Maritime Telegraph and Telephone Company Ltd. and International Brotherhood of Electrical Workers, Local 1030 (1983) 12 L.A.C. (3d) 90 (Outhouse) Police Act Sections 29(2); 40(3)

DECISION: 87-26

Easco Electric Ltd. **AND** International Brotherhood of Electrical Workers, Local 625

R. Lorne MacDougall, Arbitrator

Gerald J. McConnell, for the Union
Greg MacLeod, for the Employer
March 6, 1987

ISSUES: Arbitrability - Grievance as Limitation on 1:5300;

Statutes - Applied by Boards of Arbitration 2:1100; Estoppel-Delay in Complaining or Grieving 2:1412; Grievance Procedure-Compliance With 2:3120, Delay 2:3210, Time Limits 2:3130; Recall - Burden of Proof 3:2415; Interpretation - Anomalies 4:2100; Layoff 6:2200

CIRCUMSTANCES: The grievor, job steward on a construction site, was laid off with others on December 23. The union objected when electricians were on the job, as required by the collective agreement. The project was not completed and as many as 16 electricians were not at work. Company officials explained then and at the hearing that the foreman was "not happy with" the grievor. The union verbally protested shortly after January 5, and lodged written grievance January 26. Acting for the Employer, the Construction Association Management Labour Bureau averred that because the grievance was not processed within 5 days as stipulated in the collective agreement, it was therefore nullified and non-arbitrable, the articles of the agreement taking precedence over Section 103 of the Trade Union Act.

AWARD: The grievance succeeded, the arbitrator finding that delays were caused by the Bureau and that it had raised no question of timeliness in discussions of the grievance between January 10 and 26, after which the Minister of Labour named an arbitrator under Section 103, the Company having refused to agree on a nominee. On these facts the employer had waived or was estopped from the timeliness issue, and the matter was arbitrable.

The statutory time requirement for agreeing on an arbitrator, by the end of the day the written grievance was filed according to Section 103, takes precedence over the collective agreement, in which five days were allowed.

The employer's contention that a steward could be laid off whenever the number of electricians fell below 6 and not just on completion of a project, was upheld.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed. 1984) 79, 99; Yorkdale Drywall Limited and United Brotherhood of Carpenters and Joiners of America, Local 83 et al (1985) S.H. No. 55190 and decision of C. Denne Burchell J. (July 17, 1986, unreported); Municipal Spraying and Contracting Limited v. International Union of Operating Engineers, Local 721. (1977) 21 N.S.R. (2d) 351; Re Tobacco Workers International Union, Local 338 and Imperial Tobacco Co. (Ontario) Ltd. (1969) 20 L.A.C. 310 (Shime); Re Candel Oil Ltd. and Oil, Chemical and Atomic Workers, Local 9-666 (1974) 5. L.A.C. (nd) 225 (Lucas); Rainy River Valley Health Care and Ontario Nurses Association (1986) 20 L.A.C. (3rd) 331 (Devlin).

DECISION: 87-27

Metro Group Homes Association **AND** Canadian Union of Public Employees, Local 23

Innis Christie, Chair; Norman Hebert, Robert Cook

Laurie Hitchens, for the Union
Matthew J. Tobin, for the Employer
March 4, 1987

ISSUES: Management Rights 1:2000; Skill and Ability - Burden of Proof 3:2413, 6:3200, Criteria of Ability and Qualifications-Bona Fides 6:3300, Education 6:3320.

CIRCUMSTANCES: The grievor was denied promotion on grounds that he did not meet the qualifications. At the final grievance step, his personality traits were cited by the employer, and management right to deny asserted. The union argued that not all persons holding similar jobs had the qualifications specified in the job description, and produced correspondence and a witness in support of its claim that the grievor had educational qualifications equivalent to those required by the job.

AWARD: The grievance failed. Since the grievor did not have the required qualifications, bad faith or discrimination were not at issue. Equivalency (in the sense of the employee's ability to do the job) was not within the scope of arbitral review. Under the collective agreement, upgrading was a management right.

The arbitrator found that the grievor had neither the experience nor the education required for the job. The education requirement was reasonable, appropriate and relevant, and there was no evidence that it had been upgraded to exclude the grievor. His claim that management was prejudiced was found "convoluted and unconvincing". There was no bad faith in the upgrading since it took place well before grievor's candidacy.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed. - 1984) 301; Palmer, Collective Agreement Arbitration in Canada (2nd ed. 1983) 528; Maple Ridge and Canadian Union of Public Employees, Local 622 (1979) 23 L.A.C. (2d) 86 (Hickling); Re U.A.W. and Westeel Products Ltd. (1960) 11 L.A.C. (Laskin); Re Wotherspoon & Son Ltd. and International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1256 (1972), 25 D.L.R. (3d) 70; Re General Refractories Co. of Canada Ltd. and U.S.W., Local 14857 (1975) 10 L.A.C. (2d) 327 (shime); Reynolds Aluminum Co.Canada Limited (1974) 5 L.A.C. (2d) 251 (Schiff); Canadian Food and Allied Workers, Local 175 v. Great Atlantic and Pacific Co. of Canada

Limited (1976) 76 C.L.L.C. 14,056 (leave to appeal to the Ontario Court of appeal refused, 13 L.A.C. (2d) 211n); Carling Breweries Ltd (1968) 19 L.A.C. 110 (Christie); Union Carbide Canada Limited (1966) 17 L.A.C. 171 (Christie); Andres Wines Limited (1984) 14 L.A.C. (3d) 238 (Larson); Cyanamid of Canada Ltd. (1967) 18 L.A.C. 263 (Arrell); Northern Electric Co. Limited (1969) 20 20 L.A.C. 222 (Palmer); Sunbeam Home (1983) 13 L.A.C. (3d) 183 (Rayner); Re Oil, Chemical and Atomic Workers, Local 9-14, and Cabot Carbon (cited in Sunbeam Home); Re Montreal Children's Hospital and Fredericton of United Nurses (1974) 8 L.A.C. (2d) 17 (Bairstow); Re Oil, Chemical and Atomic Workers, Local 9-639 and Union Gas Co. of Canada Ltd. (1966) 17 L.A.C. 398 (Thomas); Re Borough of Scarborough and Scarborough Civic Employees Union, Local 368. (1977) 14 L.A.C. (2d) 350 (Andrews); St. Catherines General Hospital (1984) 13 L.A.C. (3d) 378 (Teplitsky); Re Children's Aid of Metropolitan Toronto and Staff Association of Children's of Metropolitan Toronto (1979) 24 L.A.C. (2d) 206; Re Goodyear Tire & Rubber Co. of Canada Ltd. and United Rubber Workers, Local 189 (1974) 2 L.A.C. (2d) 438 (Brown); Re U.S.A. and Falconbridge Nickel Mines Ltd. (1971) 23 L.A.C. 165 (Simmons).

DECISION: 87-28

Bowater Mersey Paper Company Limited **AND** Canadian Paperworkers Union, Local 141

J. A. MacLellan, Arbitrator

Dennis Grant, for the union
John Plowman, Nancy Murray for the employer
March 11, 1987

ISSUES: Management Rights 1:2000, 5:0000; Interpretation-Specific Versus General Provisions 4:2100, Management Rights 4:2300; Job Classifications - Creation or Revision - Transfer of Work 5:2000, Collective Agreement Limitation 5:2000, Bona Fides 5:2300.

CIRCUMSTANCES: The Company streamlined its mail services and hired two stenos, thus eliminating work for one of two office messenger positions. Grievance was laid under the Collective Agreement, which provides that layoffs shall be by attrition, and that hiring of outside employees (non-bargaining unit) should not deny promotion or employment to those in the bargaining unit.

The Company maintained that the work restructuring was within management rights as defined by the collective agreement, and that the grievor was treated fairly, being rehired within two and a half days on the resignation of the incumbent.

AWARD: The grievance succeeded in part, with an award of two and a half days pay, but denial of the union claim that the second messenger position be reinstated. Efficiency, not bad faith, was the evidence motive of the job restructuring, which therefore lay within management rights.

DECISION: 87-29

Civil Service Commission **AND** Nova Scotia Government Employees Union

Michael B. Shearer, Arbitrator

Ronald A. Pink, for the union
Jonathan Davies, for the employer
March 3, 1987

ISSUES: Remedies - Authority to Award 2:1400, 2:3124; Discipline and Discharge-Just Cause 7:1200, Warning as Discipline 7:4210, Failure to Warn 7:4416; Union-Activity and Business - on Company Time 9:1400.

CIRCUMSTANCES: An employee, told publicly by a union public relations officer that her position was to be downgraded, complained in writing to management about the officer's public actions. The officer was given verbal and written warnings against further disclosures. The original complaint and warning were put in the officer's personnel record, whereupon she grieved that both items be removed from her file, alleging they were a form of disciplinary action infringing on her right to perform her duties as a union official. Two other union representatives testified that they freely discussed job classification with fellow employees.

The employer asserted that the grievor had not been disciplined, because the warning merely stated Department policy whose violation in future would incur discipline. The onus of proof that the written warning itself was disciplinary lay on the officer.

AWARD: The grievance failed in part, the arbitrator not finding a grievable issue. However, his award confirmed that the officer had not been disciplined and that any recurrence must be treated as a first offence. Because neither side had received arbitral sanction for their acts, he suggested that the union, rather than await future disciplinary action, lodge a policy grievance to clear the air.

AUTHORITIES: Civil Service Collective Bargaining Act, S.N.S.

1978, c.3 as amended; Brown and Beatty, Canadian Labour Arbitration (2nd ed. 1984) 107, 468-9; N.S.G.E.U. & Civil Service Commission dated July 21, 1986, referred to as the Classification Review Arbitration; Re The Queen in Right of Canada and Evans et al (1983) 1 D.L.R. (4th) 328; Re l'Hospital de Montreal Pour Enfants and Infirmiers et Infirmiers Unis Inc. (1981) 29 L.A.C. (2d) 381; Re Stelco Inc. Hilton Works and United Steelworkers Local 1005 (1981) 29 L.A.C. (2d) 244; Re City of Toronto Planning Board and C.U.P.E. Local 79 (Dec. 15, 1977); Re Zuibrycki and the Crown in Right of Ontario Ministry of Industry and Trade (1982) 5 L.A.C. (3d) 282; Re Metropolitan Transit Commission of Halifax Dartmouth and the Municipality of the County of Halifax and Children's Aid Society of Ottawa and Ontario Public Service Employees Union (1978) 18. L.A.C. (2d) 437; Re Notre Dame Integrated School Board and Newfoundland Teachers' Association (1978) 22 L.A.C. (2d) 286; Pacific Press and Vancouver Newspaper Guild (1986) 23 L.A.C. (3d) 251.

DECISIONS: 87-30

Halifax Infirmary AND Canadian Brotherhood of Railway, Transport & General Workers, Local 606

J. A. MacLellan, Arbitrator

Gordon Forsyth, for the union
Laurie Sayer-Smith, for the employer
March 13, 1987

ISSUES: Remedies - Types of Remedy - Compliance Order 2:1450, Reinstatement 2:1470; Evidence - Burden, Weight of 3:2500; Discipline and Discharge - Just Cause 7:1200, Grounds for-Unsuitability 7:3530; Disciplinary Penalties - Types of Penalties - Demotion or Transfer 7:3240, 7:3544.

CIRCUMSTANCES: A hospital cook's supervisors noted food delays and recipe failures when under pressure, unclean apron and equipment. The same appraisals noted his helpfulness toward other staff and willingness to improve. He alleged that the appraisals were unduly affected by one Senior Cook's prejudice towards him. A joint union-management investigation found insufficient grounds for this charge -- the Senior Cook was difficult with everybody -- but recommended that he seek "professional help" to change his "extra-curricular" lifestyle, which they identified as the cause of his inattention to detail. In April he was given two months to improve or be fired. In June he was told he would be fired unless he accepted demotion from Senior to Staff Cook, with occasional short-order work to "hone his skills" towards eventual reinstatement.

He immediately grieved for reinstatement with lost wages, asking that "harassment and intimidation" by supervisors cease. No action was taken by the Hospital due to "procedural delay". He was denoted in August by the Director of Dietetics. In September the Director wrote a formal reference letter recommending him as a senior cook on the basis on his recent short order work.

AWARD: The grievance succeeded in part. The grievor was to be reinstated as Senior Cook within two weeks, but without back pay. The arbitrator noted that the grievor's personal problems had cleared up, and that he lost Senior pay on only 2 of the 10 shifts worked, following his disciplinary demotion on just cause.

DECISION: 87-31

The Operative Plasters and Cement Masons International Association of the United States and Canada, Local 212 ("Cement Masons") **AND** Nova Contracting ("the Company") **AND** The United Brotherhood of Carpenters and Joiners of America, Local 83 (the "Carpenters") **AND** Nova Concrete Contracting Limited (the "Company")

William H. Kydd, Arbitrator

William Boudreau, for the union
Ken Fowlie , for the company
March 10, 1987

ISSUES: Settlements 2:3230.

CIRCUMSTANCES: During the course of the arbitration the parties came to agreement on terms to resolve the dispute.

AWARD: It is directed that the Company pay the sums agreed to, at the times agreed.

DECISION: 87-32

The Operative Plasters & Cement Masons International Association of the United States and Canada, Local 215 **AND** The United Brotherhood of Carpenters and Joiners of America, Local 83 **AND** C.F.C. Concrete & Renovations Ltd.

William H. Kydd, Arbitrator

William Boudreau, for the unions
Clyde Oliver, for the company
March 10, 1987

ISSUES: Collective Agreement: Essentials 4:1100; Oral Agreements 2:1200; Contracting Out 5:1300; - Remedies 2:1424, 5:1500.

CIRCUMSTANCES: The Company, contracted to do carpentry and cement finishing work, signed a voluntary recognition agreement with the Unions. It then subcontracted the work, the subcontractor agreeing verbally that the job would be unionized. The employees signed union cards. When Union wages were not being paid on the site, the Union grieved.

The collective agreements require the Employer to agree that subcontractors must abide by the terms of the collective agreements and acknowledge this in writing. No agreement was signed by the sub-contractor to this effect. The Union claimed that there was no subcontract and claimed that the Company owed the Unions wages and benefits as set out in the collective agreements, as well as a benefit bond under terms of the Carpenters's Agreement.

AWARD: The grievance succeeds. The Company is found in breach of their agreement with the Unions with respect to the subcontractors clauses, in that they did not require the subcontractor to abide by the collective agreements.

The Company is directed to pay to the Unions (being contracting parties representing their membership) unpaid wages due to the employees under the terms of the collective agreements. The Company is directed to pay to the Unions unpaid benefits. The Company is also directed to deposit a benefit bond in accordance with the Carpenters' collective agreement.

AUTHORITIES: Re Ottawa Civic Hospital CUPE (1983) 11 L.A.C. (3d) 243; Re Oil, Chemical and Atomic Workers and Polymer Corporation Limited (1959), 10 L.A.C. 51 at page 57 confirmed by Supreme Court of Canada in (1962) S.C.R. 388.

DECISION: 87-33

The Nova Scotia Government Employees Union AND The Civil Service Commission

Bruce Outhouse, Arbitrator

Kimberley Turner, for the union
Alison Scott, for the employer
March 13, 1987

ISSUES: Leave of Absence 7:3120; Abandonment 2:3230; Arbitrability: Agreement as Primary Source of Jurisdiction 2:1200; Evidence: Burden of Proof 3:2400, Standard of Proof 3:2500; Interpretation 4:2000; Management Rights - Leave of

Absence 7:3120.

CIRCUMSTANCES: The grievor grieves denial of education leave and sabbatical leave. An application for sabbatical leave was denied for budgetary reasons. A second submission, for education leave, devised so it would eliminate the cost to the Government, was rejected by the Employer on grounds it was not required to enable the grievor to meet the requirements of her present or projected position.

The Union argued that education leave must be distinguished from teachers training; that special classes, in accord with the collective agreement would enable the grievor to fill her role "more adequately". This was interpreted by the Union to mean "improve her performance". The Union contended that the Employer acted unreasonably because (1) it didn't base its discretion on proper criteria and (2) did not apply the criteria in a reasonable fashion. The Union contended that at the very least, the Employer failed to discharge the burden of proving that it acted reasonably.

Should the grievor be denied education leave, the Union requested she be granted sabbatical leave for which she qualifies. The Union stated that although no grievance was filed against denial of sabbatical leave, the application was never formally abandoned.

The Employer contended that the grievor abandoned her application for sabbatical leave and in any event her proposed course of study is not in accord with the collective agreement. The Employer agreed that the basic question is whether it acted unreasonably in denying education leave and that the emphasis should be on the manner in which it approached the decision and not on the correctness of the decision.

The Employer argued that the burden of proof is on the Union to show that the denial of application was unreasonable.

Assumimg the Employer proceeded properly, it contended that its decision should be confirmed. On the other hand, if some irregularity is found in its dealing with the grievor's application, the Employer submitted that the only remedy available would be to remit the matter back to the Employer for proper consideration.

AWARD: The grievance fails. On the balance of probabilities, the Employer's decision to deny the application for education leave is not found to be unreasonable, given the broad discretion conferred on the Employer by the collective agreement.
In determining, whether education leave has been unreasonably denied the adjudicator must have regard to the terms of the agreement and defer to the Employer's judgement to the extent

required therein. An adjudicator should only interfere with the exercise of discretionary decision-making authority where the Employer has mis-conducted itself in a procedural sense or has made a decision which is patently unreasonable. With respect to the burden of proof, the burden of persuasion rests with the Union throughout. However, where the Union establishes that the grievor meets the requirements for education leave, a negative inference may be drawn against the Employer if it failed to explain whey the leave was denied.

In this case, the Union hasn't met the burden of demonstrating that the Employer's decision was unreasonable.

With regard to sabbatical leave, the proposed course of study was not found to fit the requirements of the collective agreement. Also, the grievor was found to have abandoned her claim to sabbatical leave when she filed an application for education leave; nor did she file a timely grievance against denial of sabbatical leave.

AUTHORITIES: Re Elesie and The Crown in Right of Ontario (Ministry of Health) (1980), 27 L.A.C. (2d) 283 (Swinton); Re Cameron and Treasury Board (Department of Transport) (1979), 22 L.A.C. (2d) 63 (Jolliffe); Re York University and Canadian Union of Public Employees, Local 1356 (1976), 12 L.A.C. (2d) 213 (abbott); Re Government of Nova Scotia and Nova Scotia Government Employees Association (1983), 11 L.A.C. (3d) 181 (Christie); Brown and Beatty, Canadian Labour Arbitration (2d ed.) p. 362; Mullan, David J., Administrative Law (Carswell, 1979). Title 3, Vol. 1, Canadian Encyclopedic Digest (Ont.) 3rd. ed., paras. 114-122.

DECISION: 87-34

United Association of Journeymen and Apprentices of the Plumbing, Steamfitting and Pipefitting Industry of the United States and Canada, Antigonish Local Union No. 244 **AND** Western Plumbing and Heating Limited

Bruce Outhouse, Arbitrator

Raymond Larkin, for the union
Hugh Simpson, for the employer
December 19, 1986

ISSUES: Delay 2:3210; Estoppel: Delay in Complaining or Grieving 2:1412, Condonation 2:2220; Union - Membership as Condition of Employment 7:7520

CIRCUMSTANCES: A jurisdictional objection by the Employer was dismissed because the grounds on which it was raised went to the merits and remedy of the case and did not deprive the arbitrator of jurisdiction to hear the present grievance on its merits.

The Union grieved that the Employer breached the collective agreement by employing a former union member (expelled for non-payment of dues) without going through the Union local. Secondly, that this breach wasn't purely technical because the Union, if contacted, would have refused to refer this employee since his membership was not paid.

The Union sought an award in damages in the amount of wages and benefits paid to the employee from the date he started work until he paid the Union fee to re-establish himself as a member. It claimed that because this is not a continuing grievance, damages are not limited to the seven-day period prior to filing of grievance. It claimed also that the seven-day limit for filing the grievance (brought up as the preliminary objection) didn't start to run until the Union discovered the violation. This would make the grievance date timely with respect to liability and damages.

The Employer contented it didn't breach the agreement because it telephoned the Union office prior to hiring; that the Union should bear the consequences of the breakdown in communications of its system. The employer argued it was at worst guilty of a technical breach - because it followed a personal agreement reached with the Union to merely contact it and advise of its intention to hire former employees; and that this agreement estopped the Union from enforcing its strict rights under the collective agreement. The Employer stated that a Union grievance must be timely or costs could be allowed to mount before the Union filed a grievance; that the grievance should be either defeated or the remedy limited to the seven-day period immediately prior to the filing of the grievance.

AWARD: The grievance succeeds in part. The Employer is found to have committed a technical breach of the collective agreement in that it failed to hire through the Union. No award to damages is granted to the Union because no actual damages were found to have been suffered by the Union or its members as a result of the breach.

AUTHORITIES: Yorkdale Drywall Limited and United Brotherhood of Carpenters & Joiners of America, Local 83 et al (July 18th, 1986) 1985 S.H. No. 55190; Trade Union Act, S.N.S. 1972, Section 103; Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1973), 4 L.A.C. (2d) 254 (O'Shea); Central Trust Company v. Rafuse et al (1986), 31 D.L.R. (4th) 481, at pp. 530-536; Re International Brotherhood of Electrical Workers, Local 1852 and Stan's Electrical Limited (July 25th, 1984), unreported (Ferguson) ; Re International Brotherhood of Electrical Workers, Local 1852 and Lynk Electric

(August 28th, 1985), unreported (Ruck).

DECISION: 87-35

International Union of Operating Engineers, Local 968 **AND** The Governors of Dalhousie College and University

Douglas G. Ruck, Chairman; Donald H. McDougall, Ronald Stockton

John McPherson, for the union
Eric Durnford, for the employer
March 31, 1987

ISSUES: Lay-off - Defined 6:2200; Interpretation - Aids to Interpretation - Statutes 4:2230, Words and Phrases - Lay-Off 6:2200; Work Assignment: Bargaining Unit Work 5:1200

CIRCUMSTANCES: After termination of a senior employee for reasons of fiscal restraint, the Union grieved that the employer failed to follow lay-off provisions of the collective agreement. It also grieved that contractors were performing duties within employees' classification while employees were laid off.

AWARD: The grievance fails. The Board found that the type of work contracted out was covered by the collective agreement, but the Union failed to prove that contracting out was the reason for the employee's release. Also, according to accepted evidence, and based on a definition of "layoff" as set out in the Labour Standards Code, no layoff had taken place. "Layoff" was distinguished from termination or elimination of a position. That there was no layoff, effectively ended the matter.

AUTHORITIES: Porter vs. C-I-L Inc. (1980) (2d) 624; Canadian General Electric Co. Ltd. vs. Oil, Chemical and Atomic Workers' International Union, Local 9-823, (1975), 11 N.S.R. (2d) 550, Robb Engineering v. United Steelworkers of America (1978), 25 N.S.R. (2d) 298; Trade Union Act, S.N.S. 1972, p. 303; Labour Standards Code, S.N.S> 1973.

DECISION: 87-36

Western Electrics Limited **AND** International Brotherhood of electrical Workers, Local 625

J.A. MacLellan, Arbitrator

Raymond Larkin, for the union
William MacInnes, for the employer

AWARD: The grievance succeeds. Provisions of the collective agreement apply to filling this position. Clauses in the agreement dealing with ability are interpreted as 'required ability', and therefore the employer was in breach of the agreement by not awarding the position to the grievor. The Board awards damages and remains seized of jurisdiction if compensation amounts cannot be agreed upon.

AUTHORITIES: Re St Catharines General Hospital and Service Employees' Union, Local 204 (1975), 10 L.A.C. (2d) 258 (Adams); Re West Nipissing General Hospital and Ontario Nurses Association (1978), 21 L.A.C. (2d) 440 (Teplitsky); Re Bank of Montreal, Tweed Branch and Commercial Workers Union, Local 486 (1982), 6 L.A.C. (3d) 289 (Carter); Re Belville General Hospital and Ontario Nurses' Association (1986), 22 L.A.C. (3d) 255 (Thorne); "Recent Trends in the Judicial Attitude Towards the Scope of an Arbitrator's Remedial Authority", Chris G. Paliare (Recent Developments in Labour Law: Canadian Bar Association - Ontario, Continuing Legal Education, 1986); Re Regal Stationery Company Ltd. and Canadian Paperworkers' Union, Local 300 (1978) 18 L.A.C. (2d) 139 (Hinnegan); Re Scarborough General Hospital and Canadian Union of Public Employees, Local 1487 (1979), 23 L.A.C. (2d) 190 (Swan); Re Governing Council of University of Toronto and Canadian Union of Public Employees, Local 1230 (1979), 24 L.A.C. (2d) 97 (Burkett); Re Elizabeth Bruyere Health Centre and Ontario Nurses' Association (1982), 6 L.A.C. (3d) 119 (Saltman); Re Island Telephone Co Ltd and International Brotherhood of Electrical Workers, Local 1030 (1983) 8 L.A.C. (3d) 132 (Christie); Re Board of School Trustees of School District No.68 (Nanaimo) and Canadian Union of Public Employees, Local 606 (1985), 19 L.A.C. (3d) 176 (Germaine); Re Corporation of City of Stratford and Stratford Professional Firefighters' Association, Local 534 International Association of Firefighters (1980), 25 L.A.C. (2d) 170 (Shime); Re Wellsley Hospital and Service Employees Union, Local 204 (1981), 2 L.A.C. (3d) 193 (Kennedy); Re J.A. Wotherspoon and Son Ltd and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 1256 (1972), 12 D.L.R. (3d) 70 (Ont. H.C.); Re Halton County Board of Education and Canadian Union of Public Employees, Local 1011 (1976), 13 L.A.C. (2d) 113 (Shime); Re Northern Telecom Canada Ltd and United Automobile Workers, Local 1535 (1984), 15 L.A.C. (3d) 50 (Beck); Brown and Beatty, Canadian Labour Arbitration (2nd ed) p.328.

DECISION 87-52

The Holiday Inn **AND** Hotel and Restaurant Employees and Bartenders Union, Local 772

David J. MacDonald, Chair; Everett Baker, Eric Durnford

March 31, 1987

ISSUES: Type of Remedy - Compliance Order 2:1450; Evidence-Types of Evidence - Past Practice 3:4430; Interpretation-Ancillary Documents 4:1200, Intention of the Parties 4:2100; Work Assignment - Employees Within Unit - Remedies 5:1500; Job Classifications - Collective Agreement Limitation 5:2200.

CIRCUMSTANCES: The union grieved that the ratio of apprentices to journeymen employed exceeded what the collective agreement allowed. Past practice had been to set ratios according to the value of the subcontract, an interpretation maintained in this case by the employer. He refused to agree on an arbitrator, who was appointed by the Minister of Labour, under Section 103 of the Trade Union Act. This clause of the agreement had been problematic in the past, according to the union, which a year ago drew up an "Interpretation of Collective Agreement" document to which the Construction Association Management Labour Bureau had agreed.

AWARD: The grievance succeeded, following the interpretation in the ancillary document. The apprentice ratio is determined by the value of the total contract for a project, not the smaller subcontract value. The company was ordered to comply forthwith, and in addition to pay the union the difference in wages from the day of the grievance.

DECISION: 87-37

Canada Post Corporation AND Canadian Union of Postal Workers, C.P.C. No. 86-1-3-5120 and 5828 C.U.P.W. No. A-18-H-6 and 10

Innis Christie, Arbitrator

Wayne Mundel, for the union
Wally Legge, for the employer
March 23, 1987

ISSUES: Discharge and Discipline - Burden of Proof 3:2411, 7:2300; Evidence - Weighing the Evidence 3:5100; Interpretation-Aids to Interpretation - Prior Awards 4:2220; Disciplinary Penalties - Types of Penalties - Monetary Penalties 7:4240.

CIRCUMSTANCES: Two clerks in a philately department who had cash shortages grieved when the amounts were deducted from their pay. In previous awards, arbitrators held that if an employer's security system foreclosed external causes, specific acts of carelessness did not need to be proved; and that the onus was then on the employee to produce a reasonable explanation other than carelessness. The grievors claimed that other clerks,

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J. Bernard Boudreau, for the Union
Terry Roane, for the Employer
April 13, 1987

ISSUES: Seniority 6:0000, Applications 6:2000, Lay-Off 6:2200, Recall 6:2354; Past Practice 3:4430; Management Rights 4:2300, 5:0000

CIRCUMSTANCES: The grievor alleges he was denied work which was given to a less senior employee in a higher job classification, but whose duties overlap those of the grievor. The grievor contends seniority is assigned on a departmental basis, not on the basis of classification. This is supported by past practice. The employer maintains that seniority is not determined departmentally, and that classification and seniority are used in determining schedules, etc, as is the employer's right. In the grievor's case, the employer contends there is no violation of the collective agreement.

AWARD: The grievance is dismissed. The collective agreement is ambiguous about classification, but the intent of the section is to recognize departmental seniority rights by classification. Therefore, scheduling within a department is to be done by seniority within a classification. Past practice does not apply since it does not clarify the present ambiguity.

DECISION 87-53

Kings County District School Board AND Canadian Union of Public Employees, Local 1068

J.A. MacLellan, Chair; Charles Weir, Jr., Alan Tufts

Al Cunningham, for the Union
David Waterbury, for the Employer
April 22, 1987

ISSUES: Wages - Alteration of Wages 8:1400, Management Rights 8:1400; Work Assignment - Fairness 4:2300; Organization of the Workplace 5:0000

CIRCUMSTANCES: The grievor alleges that his wages were reduced as a result of unjust disciplinary action. The employer denies disciplining the grievor, but acknowledges that scheduling changes resulted in lost wages for the grievor. The employer contends these changes were made to increase safety conditions on a bus route.

AWARD: The grievance fails. The employer acted in good faith to correct a situation. The grievor is not entitled to additional letter carriers and drivers (one of whom had been discharged for theft) had access to the area, that they had been called away from their wicket at times due to short-staffing, and that the Supervisor had at times sold stamps during their absence. The Supervisor denied the first two points and testified that he had only sold stamps in the presence of a clerk who doubled checked all amounts.

AWARD: The grievance failed on the employees' inability to offer sufficiently convincing explanations. A separate policy grievance against the supervisor's performance of bargaining unit duties might have been lodged.

AUTHORITIES: Arbitrator Swan in MacEwen (1985) C.P.C. Nos. 85-1-3-2863, 4 and 5; C.U.P.W. Nos. 298-GG-2304, 5 and 6; Arbitrator Outhouse in Blackburn (1986) C.P.C. No. 86-1-3-3121; C.U.P.W. No. A-24-H-224.

DECISION: 87-38

Canada Post Corporation **AND** Canadian Union of Postal Workers
C.P.C. No. 86-1-3-5823, C.U.P.W. No. A-18-H-4 and 5

Innis Christie, Arbitrator

Wayne Mundle, for the union
Wally Legge, for the employer
March 23, 1987

ISSUES: Arbitrability - Waiver of Procedural Irregularities 2:3130; Disciplinary Penalties - Types of Penalties - Monetary Penalties 7:4240.

CIRCUMSTANCES: Grievors were held responsible for cash shortages.

AWARD: Not arbitrated, the union having admitted a procedural irregularity in the grievance.

DECISION: 87-39

Canada Post Corporation **AND** Canadian Union of Postal Workers
C.P.C. No. 86-1-3-7165, C.P.U.W. No. A-59-H-255

Innis Christie, Arbitrator

D.W.Tingley, for the union
J. H. Currie, for the employer
March 23, 1987

ISSUES: Discharge and Discipline - Evidence - Burden of Proof 3:2411, 7:2300; Interpretation - Words and Phrases - Emergencies and Other Unanticipated Happenings - Abnormal or Special Conditions 5:3100; Leave of Absence 7:3120; Disciplinary Penalties - Arbitral Review - Substitution of Penalty 7:4000, Mitigating Factors 7:4400.

CIRCUMSTANCES: The wife of a couple, both of whom worked at the post office, grieved for special leave she requested when both children were sick, one having to be taken to a doctor, and then cared for at home. Her husband had been granted a half shift special leave that evening for the family emergency.

AWARD: The grievance succeeded in part, with award of a half-shift special leave on grounds of fairness. The arbitrator suggested that both employer and employee might have found different solutions to the problem.

AUTHORITIES: Arbitrator Clive McKee in D. Desaulniers (July 17, 1984) C.U.P.W. No. W-350-GG-437, C.P.C. No. 84-1-3-1200.

DECISION: 87-40

Canada Post Corporation **AND** Canadian Union of Postal Workers
C.P.C. Nos. 86-1-3-7166 and 7; C.U.P.W. Nos A-59-H-256 and 258

Innis Christie, Arbitrator

D. W. Tingley, for the union
J. H.Currie, for the employer
March 23, 1987

ISSUES: Discharge and Discipline - Evidence - Burden of Proof 3:2411, 7:2300; Interpretation - Words and Phrases - Emergencies and Other Unanticipated Happenings - Abnormal or Special Conditions 5:3100; Leave of Absence 7:3120; Disciplinary Penalties - Arbitral Review - Substitution of Penalty 7:4000, Mitigating Factors 7:4400.

CIRCUMSTANCES: A couple working at the post office grieved when denied special leave in the snowstorm of January 4 at Moncton, describing their difficulty in driving four miles. On reaching the Post Office parking lot, in which only a small area was cleared, they returned home rather than risk the car. The supervisor, who had come twelve miles, noted that other employees had reached the lot and reported in, receiving leave (full pay) for making the attempt. Evidence showed 52 cm. of snow and great difficulty in driving; the condition of public transport at the time is unknown. Several other employees were granted leave.

AWARD: The grievance succeeds in part, with award of pay up to the time they entered the parking lot and it was physically possible for them to report for work. The arbitrator applied a fourhold test from the Andrews case.

AUTHORITIES: Gail Brent in Lang and Paige (adjudicator under the Public Service Staff Relations Act between the Letter Carriers Union and the Treasury Board. (Post Officer Department), Nov. 7, 1978; Re Dollar and Treasury Board (Canadian Employment and (Immigration Commission) (1979) 21 L.A.C. (2d) 34 adjudicator D. G. Pyle; Benson et al. (166-2-1577/1564) cited by Pyle; arbitrator Clive McKee in D. Desaulniers (July 17, 1984) C.U.P.W. No. 350-GG-437, C.P.C. No. 84-1-3-1200; Andrews (May 8, 1975) cited by McKee; adjudicator Meyer in Villeneuve 166-2-629 at 6, Leclair 166-2-631, cited by Beatty in Andrews.

DECISION: 87-41

Canada Post Corporation **AND** Canadian Union of Postal Workers, C.P.C. No. 86-1-3-7169, C.U.P.W. No. A-59-H-308

Innis Christie, Arbitrator

D. W. Tingley, for the union
J. H. Currie, for the employer
March 23, 1987

ISSUES: Discharge and Discipline - Evidence - Burden of Proof 3:2411; Interpretation - Words and Phrases - Emergencies and Other Unanticipated Happenings - Abnormal or Special Conditions 5:3100; Leave of Absence 7:3120; Disciplinary Penalties-Arbitral Review - Substitution of Penalty 7:4000, Mitigating Factors 7:4400.

CIRCUMSTANCES: The grievor was denied special leave during the snowstorm of March 11 at Moncton. A quarter mile from home and ten miles from work, her car skidded into the ditch. When a neighbor refused to drive her to work, she phoned in. RCMP radio announcements were asking the public to stay off the roads. However, taxis were operating, no other employees were given special leave, and grievor had been denied a similar request on the preceding shift (see decision 87-42).

AWARD: The grievance fails. On her own evidence, the accident was not sufficiently bad to prevent her working. She might have been entitled to full pay for the shift if she had reported late.

AUTHORITIES: Arbitrator referred to his citations in the preceding decision 87-40.

DECISION: 87-42

Canada Post Corporation **AND** Canadian Union of Postal Workers, C. P. C. No. 86-1-3-7168, C.U.P.W. No. A-59-H-307.

Innis Christie, Arbitrator

D. W. Tingley, for the union
J. H. Currie, for the employer
March 23, 1987

ISSUES: Discharge and Discipline - Evidence - Burden of Proof 3:2411; Interpretation - Words and Phrases - Emergencies and Other Unanticipated Happenings - Abnormal or Special Conditions 5:3100; Leave of Absence 7:3120; Disciplinary Penalties-Arbitral Review - Substitution of Penalty 7:4000, Mitigating Factors 7:4400.

CIRCUMSTANCES: Grievor was denied special leave during the snowstorm of March 10 at Moncton, when 4.1 cm. of snow fell and wind was 21.3 km/hour. The road on which she lives is subject to severe drifting. She testified that other cars had got stuck that night, and that the RCMP had warned her to stay off the roads. However, her supervisor testified that taxi service was available in her area. No other employees sought special leave at the time, though four reported sick.

AWARD: The grievance failed. Snow conditions were not severe. No attempt was made to reach work by taxi. The arbitrator ruled that because they serve police and municipal interests, traffic warnings are not determinative.

AUTHORITIES: Citations as in the preceding decision 87-40.

DECISION: 87-43

Canada Post Corporation **AND** Canadian Union of Postal Workers, C.P.C. No. 86-1-3-7170, C.U.P.W. A-59-H-310.

Innis Christie, Arbitrator

D.W.Tingley, for the union
J. H. Currie, for the employer
March 23, 1987

ISSUES: Discharge and Discipline - Evidence - Burden of Proof 3:2411, Interpretation - Words and Phrases - Emergencies and

Other Unanticipated Happenings - Abnormal or Special Conditions 5:3100; Leave of Absence 7:3120; Disciplinary Penalties-Arbitral Review - Substitution of Penalty 7:4000, Mitigating Factors 7:4400.

CIRCUMSTANCES: Grievor was refused special leave for March 6 to drive his child from Moncton to a hospital appointment in Halifax the next day. He had arranged for his rotating day off on the 7th, but left on the 6th when heavy snow was forecast; 24 cm. in fact fell on the 7th. The Post Office representative argued that it was irresponsible to arrange only one morning to drive in a period of winter storms; that it was a gamble only the employer could lose; and that the collective agreement allowed special leave only when employees are "prevented" from reporting for work.

AWARD: The grievance succeeded, with award of full pay for the shift of March 6. The Post Office's first point would require the employees to arrange for contingencies on the day after as well as before the 6th, and he was reasonable in not switching R.D.O.'s to that extent. Its third point was inconsistent with local practice (87-39) above). Since such practices may vary across Canada, the arbitrator under Appendix E, para. 25 of the collective agreement, stated that this award "shall not constitute a precedent for subsequent arbitration".

AUTHORITIES: Arbitrator Christie in Basque, C.U.P.W. No. A-59-H-255, C.P.C. No. 86-1-3-7165; arbitrator Outhouse in Chaffey (June 6, 1984) C.U.P.W. No. A-4-66-15, C.P.C. No. 84-1-3-1586.

DECISION: 87-44

Glace Bay Central Credit Union AND Union of Bank Employees, Local 2107

J. Bernard Boudreau, Chair

March 25, 1987

ISSUES: Remedies - Type of Grievance - Work Assignment Inside Unit 5:1500; Management Rights - Work Assignment 5:2000; Job Classification - Collective Agreement Limitations 5:2200.
Illness or Disability - Benefits 8:3300; Classifications and Descriptions - Creation or Revision - Change in Work Load/Job Function 5:2410.

CIRCUMSTANCES: A bookkeeper of 9 years' seniority, on return to work in Sept. 1986 from 9 months of physiotherapy, found that her functions had been reassigned to others, and were totally replaced by an integrated computer system on Jan. 1987. In the process she was downgraded to teller. She grieved improper job classification, back pay, and sick leave entitlement based on the half-day weekly she still had to attend physiotherapy.

The employer claimed (1) that computerization had been foreseen by all parties to the collective agreement, that similar changes had taken place in other banks and credit unions: (2) that bookkeeping duties had now become redundant; (3) that, following General Bakeries and Bell Canada precedent, as medical appointments were due to a chronic condition which did not bar the employee from work, they were ineligible for sick leave.

AWARD: The grievance succeeded, with back pay to Jan. 15, 1987 and entitlement to sick leave, including resulting vacation pay. The employer's arguments were dealt with (1) no specific provision was made in the collective agreement, for eliminating the position, though management had the right to add duties to make up a full day's work, as the bookkeeping content diminished under automation: (3) that since grievor's condition had improved, the medical condition was not "chronic" and treatment was allowable sick leave. However, on (2) though previous reassignments of her bookkeeping functions had been improper, total redundancy by Jan. 15, 1987 ended grievor's higher pay and classification.

AUTHORITIES: Re General Bakeries Ltd. and Milk and Bread Drivers Union, Local 647, (1981) 2 L.A.C. 444; Bell Canada, cited therein; Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43 10 L.A.C. (2d) 247.

DECISION: 87-45 *

The Northside-Victoria District School Board **AND** Canadian Union of Public Employees, Local 981.

Charles J. Keliher, Arbitrator

Kevin MacNeil, for the union
David Ryan, for the employer
Jan. 12, 1987

ISSUES: Remedies - Type of Grievance - Improper Work Assignments - Work Assignment Outside Unit 5:1500; Work Assignment Within Unit 5:1500; Management Rights - Work Assignment 5:2000; Job Classification - Collective Agreement Limitations 5:2200; Job Posting - Vacancy 5:2510.

CIRCUMSTANCES: The union grieved that the employer did not declare a vacancy when a driver-warehouseman was retired. He had been kept on past normal retirement age, and his duties were gradually reassigned to others as his health deteriorated. His only remaining duty, parcel delivery, was contracted out when he retired. The School Board argued that the job was now redundant, and therefore the vacancy did not exist.

AWARD: The grievance succeeded. Redundancy was not declared because the amount of work available had been reduced, but on considerations peculiar to the previous employee.

AUTHORITIES: Canadian Labour Arbitration (1984) 2nd, at 241; decision of David J. MacDonald in The City of Sydney and the Canadian Union of Public Employees, Local 933 (Dec. 16, 1983)

* See Decision: 88-91

DECISION: 87-46

Doug Burns Excavating Contracting Limited **AND** U.M.W.A., District 26, Local 2268

L. McIntyre, arbitrator

Terry McVarish, for the union
Mr.Boudreau, for the employer
March 4, 1987

ISSUES: Estoppel - Delay in Complaining or Grieving 2:3210; Interpretation - Aids to Interpretation - Ancillary Documents 4:1200; Seniority - Termination of Seniority 6:1200,- Applications - Recall 6:2000, 6:2354.

CIRCUMSTANCES: A truck driver, while on seasonal layoff in 1982 worked for another company at the same mine site. He was sixth from the top in seniority at Burns. Five months later the Burns company wrote him, asking for a written reply if he wished to get recall notices. He failed to do so. By September 1985, his name was off the Burns seniority list. In June 1986, the union signed a new collective agreement and ancillary documents, restoring his name but near the bottom of the seniority list. Recalled by Burns in September 1986, the driver grieved for his lost status. The company objected on grounds of timeliness, showing the June agreement and documents.

AWARD: The grievance fails as untimely.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration at 265; Re Federal Wire and Cable 3 U.M.A.C. 276; dist'd G. M. Sweeney, Komac Construction and United Mine Workers November 19, 1985; dist'd G. M. Sweeney, Komac Construction and United Mine Workers re Sheldon Kendall November 26, 1985.

DECISION: 87-47

Canada Post Corporation **AND** Canadian Union of Postal Workers Re C.U.P.W. National, C.P.C. No. 85-2-3-28, C.U.P.W. No. N-1000-H-1

Innis Christie, arbitrator

Ann MacTavish, for the union
Ross Dumoulin, for the employer
April 8, 1987

ISSUES: Estoppel - Procedural Irregularities not Objected to 2:3130, - Delay in Complaining or Grieving 2:3210; Interpretation - Intention of the Parties 4:2100, - Management Rights 4:2300; Wages - Alternative of Wages - 8:1400, 9:1100, - Withholding Wages 8:1420.

CIRCUMSTANCES: During gradual elimination of the Imprest Account Pay System for casual workers, in May 1985 the Post Office decided to transfer 180 workers across Canada to the biweekly Regional Pay System. In June it notified C.U.P.W. that the change would occur at the end of July. The union grieved that in the changeover, employees would get paid a week later than usual. The union demanded the change be nullified, and the workers repaid for the cost of borrowing a week's salary. It grieved that the employer had failed to negotiate changes in working conditions, contrary to the collective agreement, and pointed to a special clause providing that the union's silence on any point could not eliminate its right to grieve. C.P.C. Labour Relations Manager stated that there were no complaints from previous changes, that it was a valid change in method of payment, that written notice was given, and that he discussed the matter on the phone with the National Secretary Treasurer, who never called back.

AWARD: The grievance succeeds. Wages and other financial benefits are included in the clause requiring negotiation of any changes in working conditions. The "Union silence" clause in the collective agreement precludes estoppel. The employer must compensate the workers. Management were within their rights to change the pay system but should have negotiated the impact on workers.

AUTHORITIES: dist'd C.N./C.P. Telecommunications (1981), 4 L.A.C. (3d) 205 (Beatty, arbitrator), Re C.N.C.R. Co. et al and Beatty et al (1981), 128 D.L.R. (3d) 236, 34 O.R. (2d) 385.

DECISION: 87-48

The Nova Scotia Government **AND** Nova Scotia Government Employees Union

Milton J. Veniot, arbitrator

R.A. Pink, for the union
Jonathan Davies, for the employer
March 27, 1987

ISSUES: Evidence - Weighing the Evidence 3:5100; Discipline and Discharge-Evidence - Burden of Proof 3:2411, 7:2300; - Grounds for - Unsuitability 7:3530, - Just Cause 7:1200, Other Standards 7:1300; Disciplinary Penalties - Mitigating Factors - Condonation 2:2220, - Discrimination 7:4414, - Rehabilitative Potential 7:4422.

CIRCUMSTANCES: An addiction counsellor grieved when dismissed for improper conduct involving relationships with two of his clients, as well as borrowing money from them. The grievor alleged discrimination, in that other counsellors had not been disciplined for similar involvements. His counsel also questioned whether he should be considered a professional counsellor, whether the employer had made ethical standards clear to him, whether one of the women was a client at the time their relationship began; and produced evidence of his good work in other cases.

AWARD: The grievance failed. The arbitrator found the grievor misleading and evasive. Evidence about other counsellors was mere hearsay, whereas his misconduct was clear and irrefutable. Mitigating circumstances and discrimination were not proven by the grievor. His conduct was wilful and carried on over a longer period, not an isolated incident. Counsellors in this agency must deal with the whole family, cannot be directly supervised, and have a duty of trust to other members of the agency and the public. His inability at the hearing to admit he had done wrong indicated poor understanding of professional ethics, showing little chance of rehabilitation.

The complainants were not admitted to the hearing, on the grounds that they were not parties whose status or benefits under the collective agreement might be affected by the outcome. They had originally lodged complaint with the Human Rights Commission.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed. 1984) at 486 Civil Service Collective Bargaining Act s.35(2); Drug Dependency Act S.N.S. 1972, c.3; Nova Scotia Human Rights Act Re Canadian Union of Public Employees and Office and

Professional Workers International Union, Local 491 (1982), 4 L.A.C. (3d) 385; Re Wesstroc Industries Limited and United Cement, Lime and Gypsum Workers, Local 366 (1973), 5 L.A.C. (2d) 61. Dist'd: Re Hoogendoorn and Greening Metal Products and Screening Equipment Company et al (1967), 65 D.L.R. (2d) 641 International Union, Local 488 (1978), 20 L.A.C. (2d) 87; Re International Chemical Workers, Local 161, and Consumers Gas Co. (1962), 13 L.A.C. 7: Re Dayton Tire Canada Ltd. and United Rubber Workers Local 494 (1980), 25 L.A.C. (2d) 74; Re Brunn and Treasury Board (Post Office Department) (1980), 29 L.A.C. (2d) 103; Re Corporation of the City of Calgary and Amalgamated Transit Union, Local 583 (1918), 4 L.A.C. (3d) 268; Re Government of the Province of Alberta and Alberta of Provincial Employees (1982), 5 L.A.C. (3d) 429; Re Government of the Province of British Columbia and British Columbia Government Employees' Union (1980), 26 L.A.C. (2d) 71; Re Government of the Province of Alberta and Alberta of Provincial Employees (1983), 8 L.A.C. (3d) 1; Re Dartmouth District School Board and Nova Scotia Union of Public Employees, Unit No.2 (1983) 12 L.A.C. (3d) 425.

DECISION: 87-49

Civil Service Commission **AND** Nova Scotia Government Employees Union

Bruce Outhouse, arbitrator

Kim Turner, for the union
Alison Scott, for the employer
April 8, 1987

ISSUES: Interpretation - Reasonableness 4:2100; Management Rights 4:2300, 5:0000; Vacation - Refusal to Comply with Schedule 7:3610; - Scheduling Vacations 8:3240.

CIRCUMSTANCES: Three laboratory assistants at a Technical Institute grieved when the principal denied their request for vacations during the school year. Citing past practice, they showed that the principal's 1983 ruling that holidays must be taken in July-August was relaxed after consultation with the union. He agreed in writing to consider Christmas and March breaks too, and two years later granted requests for odd days for one, and whole weeks for the other two during classes, on assurance by their supervisors that those remaining could carry the extra load; there were some additional costs for supplies.

In 1986, the principal overruled the supervisors, demanding conformity to his written policy. Overtime and other costs were to be avoided. Standard school breaks were sufficient and reasonable times in which to take vacations. The employer's chief argument was efficiency.

Making the issue a policy grievance for the future, the union differed in its interpretation of the collective agreement, which states that "subject to operational requirements," the principal "shall make every reasonable effort to ensure that an employee's written request for vacation leave is approved"; thus (as in other cases cited) the employer bears the burden of proof of operational necessity.

AWARD: The grievance fails. The employer's policy is reasonable on grounds of efficiency and economy. The clause cited by the union does not establish mandatory vacation rights, but the longstanding practice may continue of allowing a day or two during the school year for storms or other contingencies.

AUTHORITIES: Re N.S.G.E.U. on behalf of Bernard LaRusic and C.S.C. (March 11th 1985) unreported (Outhouse); Re United Electrical Workers, Local 522, and Fairbanks-Morse (Canada) Ltd., (1968) 19 L.A.C. 27 (Johnston); Re Kester Solder of Canada Ltd. and United Automobile Workers, Local 397, (1974) 6 L.A.C. (2d) 284 (Brown Dist'd: Re Whitby Boat Works Ltd. and United Brotherhood of Carpenters and Joiners, Local 2679 (1980), 27 L.A.C. (2d) 269 (O'Shea); Re Government of Nova Scotia and Nova Scotia Government Employees Association (1983), 11 L.A.C. (3d) 181 (Christie); Re Sherbrooke Community Society and Saskatchewan Union of Nurses, Local 22 (1981), 2 L.A.C. (3d) 97 (Norman); Re Intercraft Industries of Canada Ltd., and United Brotherhood of Carpenters and Joiners of America, Local 2679 (1985), 22 L.A.C. (3d) 281 (Solomaternko).

DECISION: 87-50

Town of Sydney Mines **AND** Canadian Union of Public Employees, Local 761

Charles O'Connell, arbitrator

Duncan MacLean, for the union
Cathy Pentz for, the employer
April 13, 1987

ISSUES: Seniority - Acquisition - Non-Working Periods 6:1110,- Non-Unit Employees 6:1120; - Applications - Bumping 6:2330.

CIRCUMSTANCES: The town employed several workers as casuals. Grievor worked from May 1985, one day short each month, until asked to fill in for a sick fulltimer. Urged to join the union, she did so. Seniority was not discussed. Receiving notice of dismissal in January 1986, she wrote the town that she intended to bump a casual in the Police Department. Her request was allowed, then countermanded, whereupon she filed grievance.

The employer argued that in joining the union to gain certain fringe benefits, she had waived her seniority rights, and that she was only a term employee.

AWARD: The grievance succeeds. The collective agreement prohibits any such waiver, written or verbal. The Town and its Board of Police Commissioners are considered to be a single employer, under the Trade Union Act, S.20. Seniority is defined as length of service with the town, whether in or outside the bargaining unit. Grievor's must be reckoned from May 1985, and she must be paid arrears as a police secretary from January 1986.

AUTHORITIES: Trade Union Act, s.20.

DECISION 87-51

Children's Aid Society of Cape Breton AND Canadian Union of Public Employees, Local 3010

Bruce Outhouse, Chair; Thomas Pickford, Frank Elman

Brian Sheehan, for the Union
Bernard Boudreau, for the Employer
April 14, 1987

ISSUES: Seniority 6:0000, Applications 6:2000, Promotion, Demotion and Transfer 6:2000, 6:2100, Vacancy 5:2510; Skill and Ability 6:3000, Arbitral Review - Senior Employee if Relatively Equal 6:3220, Senior Employee with Required Ability 6:3210; Evidence - Types of Evidence - Extrinsic Evidence 3:4400, Past Practice 3:4430; Remedies - Type of Grievance - Work Assignment within Unit 5:1500, Type of Remedy - Damages - Certainty of 2:1410

CIRCUMSTANCES: The union alleges that the grievor was denied a temporary replacement position which was filled by a less senior employee. The union maintains that past practice is to award the position to the senior employee with required ability. The grievor maintains that the collective agreement has been violated since her seniority and ability have been ignored. The union asks for damages, rather than the position, since the permanent employee has returned to his position. The employer argues that although the grievor had more seniority, no violation occurred because the position involved was outside of the bargaining unit. They claim to be justified in their actions by filling the position with an employee who was more qualified than the grievor.

wages under the terms of the collective agreement.

DECISION 87-54

Canada Post Corporation AND Canadian Union of Postal Workers

Innis Christie, Arbitrator

Darrell Tingley, for the union
Ian Szlazzk, for the employer
April 22, 1987

ISSUES: Management Rights 5:0000, Vacancy 5:2510

CIRCUMSTANCES: The employer deleted several positions which were made vacant by transfer or retirement. The union argues that this violates Appendix "T" to the collective agreement which discusses job security. The union requests that these positions be filled. The employer argues that Appendix I does not apply to reduction of its work force through attrition, but provides for relocation of employees whose positions are eliminated.

AWARD: The grievance is dismissed. The overtime agreement and Appendix T are interpreted as providing protection to surplus employees, and not as protecting the total employment complement by precluding reduction through attrition.

AUTHORITIES: Cumberland Local (unreported, April 11, 1983) C.U.P.W. No. A-16-GG-1, C.P.C. No. 82-1-8-1514 (Christie); Air Canada (1975), 8 L.A.C. (2d) 239 (Brandt); Toronto Star Limited (1976), 12 L.A.C. (2d) 397 (Dunn); Nabols Foods Limited (1982), 2 L.A.C. (3d) 353 (Germainre); Ottawa - Cornwall Broadcasting Limited (CJOH - TV) (1982), 4 L.A.C. (3d) 283 (Carter); Pillington Brokers Canada Ltd. (1976), 13 L.A.C. (2d) 287 (Burkett, Chair); Beacon Hill Lodges of Canada Ltd. (1985), 20 L.A.C. (3d) 316 (McLaren, Chair); Saint John's Local (December 17, 1984), C.U.P.W. Nos. A-9-GG-317 and 368; C.P.C. Nos. 83-1-3-1427 and 28.

DECISION 87-55

The Dartmouth Senior Care Society (Operators of Oakwood Terrace) AND Canadian Union of Public Employees, Local 2774

J.A. MacLellan, Chair; Michael Tynes, Donald McDougall

Al Cunningham, for the Union
Eric Durnford, for the Employer
April 24, 1987

ISSUES: Discipline and Discharge - Grounds For - Attitude 7:3580, 7:3660, Unsuitability 7:3530; Remedies - Type of Grievance-Discharge or Suspension 2:1421, Types of Remedy - Damages-Reinstatement 2:1470, Substitution of Lesser Penalty 2:1470

CIRCUMSTANCES: The grievor was dismissed based on reports she had abused patients. The grievor denies the allegations, but admits to being frustrated in the situation under investigation. She denies having acted improperly, and requests reinstatement. The employer contends the employee's dismissal was justified since high standards of conduct and trust are expected of members of the health care professions. The grievor does not exhibit tolerance of change in routine, etc.

AWARD: The grievance succeeds in part. The grievor is reinstated as a probationary employee, and is to be closely observed for six months. If the grievor acts inappropriately during the probation period, the employer will be in a position to terminate without the grievor having a right to challenge the dismissal. No compensation is awarded for the period of suspension prior to reinstatement.

DISSENT: (McDougall) The grievance should have been dismissed, and the grievor terminated. The grievor is not seen to be intentionally abusive of patients, but her inability to contain her frustrations is incompatible with public work. The grievor is therefore unsuited to this position. In a related incident concerning workman's compensation payments, the grievor has also shown herself not to be trustworthy, and to be lacking in credibility.

AUTHORITIES: Re Baptist Housing Society (Grandview Towers) v. Hospital Employees Union (1982), 6 L.A.C. (3d) 430;

DISSENT: National Harbours Board Police v. P.A.N.S. on behalf of grievor Robert J. Harris; Twin Cities Cooperative Dairy and Teamsters' Location 927 on behalf of Mr David Assoun; Lord Nelson Hotel v. Hotel Employees and Restaurant Employees Union, Local 662 on behalf of Mr Roger Lewis; Re Government of the Province of British Columbia and British Columbia Government Employees Union (1980) 26 L.A.C. (2d) 71 (Hope)

DECISION 87-56

Inverness County Municipal Housing Corporation (Inverary Manor) AND Canadian Union of Public Employees, Local 1485

J. A. MacLellan, Chair; Everett Baker, Donald MacDougall

John Elder, for the union
Eric Durnford, for the employer
May 7, 1987

ISSUES: Occupational Health and Safety Act, S.N.S. 1985, c.3; Discipline and Discharge - Grounds for - Refusal to Obey Instructions 7:3610, 7:3612, Health and Safety 7:3621; Evidence- Types of Evidence - Past Practice 3:4430; Interpretation- Management Rights 4:2300; Management Rights - Work Assignment 5:2000; Remedies - Types of Remedy - Substitution of Lesser Penalty 7:1300, 7:4000, 7:4100.

CIRCUMSTANCES: Five grievors refused to carry linen upstairs, claiming the right to refuse unsafe work under the Nova Scotia Health and Safety Act, alleging that the work was too hard on them, often coming at the end of their shift. 75% of the patients require linen changes 3 or 4 times daily.

This duty, formerly performed by nurses, was being assigned to support staff. Both groups had previously, on April 9 and 14, indicated they might refuse. Management suggested taking smaller loads, demonstrated safe methods of lifting and carrying, warned, and on April 16 gave two-day suspensions to four support workers and a nurses' aid for insubordination.

AWARD: The grievances fail. A government Safety Inspector later found that the work was safe, though physically demanding. The evidence is that the refusal was unrelated to end-of-shift, and that the real issues was a longstanding work assignment dispute. Unlike management, the grievors did not try to find a reasonable solution. Because patients' health was at risk, no substitution of penalty was awarded.

AUTHORITIES: Occupational Health and Safety Act, S.N.S. 1985, c.3, s. 22(1); Canada Labour Code, s. 82.1, cited in William Gallivan and Cape Breton Development Corporation (1982) 1 Can. L.R.B.R. 241 at 248 (Jamison); Pharand v. Inco Metals Company, (1980) 3 Can. L.R.B.R. 194 (Ont.) (Picher) at p. 208.

DECISION 87-57

Civil Service Commission AND Nova Scotia Government Employees Union

Michael B. Sherar, Chair; Eric Durnford, Al Cunningham

Ronald A. Pink, for the union
Alison Scott, for the employer
April 23, 1987

ISSUES: Overtime - Statutory Holiday 8:3130; Statutory Holidays -Holiday Pay and Other Benefits 8:3140; Estoppel 2:2200, 2:2210, 2:2220; Interpretation - Aids to Interpretation - Ancillary Documents 4:1200. Evidence - Types of Evidence - Past Practices 3:4430; Intention of the Parties 4:2100.

CIRCUMSTANCES: Six workers filed grievances for non payment of holiday overtime. The collective agreement stipulates 2 1/2 times pay, in the form of time and a half pay, plus "hour for hour" time off in lieu - lieu time to be paid at regular rates if it cannot be taken. The grievors, working on a "compressed work week", had 12-hour instead of 8-hour shifts. They claim lieu time pay for the full 12 hours. Two other hospitals had accepted this interpretation.

The employer argued that they were only entitled to 8 hours lieu time. A memo of October 1983 issued by the union president stated that the lieu time clause is only applicable to "the first eight hours of a twelve hour shift". The first 8 hours received holiday premium at 2 1/2 times pay, but the last 4 received only 1/2 pay with no lieu time. Because the last contract was negotiated under this understanding, the union should be estopped from enforcing its strict rights.

AWARD: The grievance fails. While the interpretation urged by the union is accepted, the union memo and past practice estop a change until the next round of bargaining. By this grievance, notice is given the employer that the union intends to exert its strict rights in future.

DISSENT: Durnford argued a prima facie interpretation that the "hour for hour" clause applied only to the first eight hours (i.e. the standard shift), of which the union memo was unusually strong confirmation.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed. 1984) para. 2:2210; Re Hawker Siddeley Canada Inc. Trenton Works Division and U.S.W. Local 1237 (1983), 59 N.S.R. (2d) 29 at p.40; Combe v. Combe (1951) 1 All E.R. 767 (C.A.) 770; Re the Crown in Right of Nova Scotia and Nova Scotia Government

Employees Union (1985) 21 L.A.C. (3d) p.35 (Darby); Civil Service Commission of Nova Scotia v. Nova Scotia Government Employees Union Milligan and Terrio (1986), 73 N.S.R. (2d) p.50, 55; Nova Scotia Government Employes Union and Civil Service Commission and Houghton (Sept. 11, 1986) (Outhouse); Re Auto Family Credit Union (Niagara) Ltd. and United Auto Workers, Local 374 (1980), 27 L.A.C. (2d) 370 at p. 377; Re Hydro Electric Power Commission of Ontario and Canadian Union of Public Employees, Local 1000 (1982), 43 L.A.C. (3d) 216 at p. 226; Re Ford Motor Co. of Canada Ltd. and United Automobile Workers, Local 240 (1983), 13 L.A.C. (3d) p.38, 49; Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-242 (1982), 6 L.A.C. (3d) at p.43 (MacDowell).

DECISION 87-58

Civil Service Commission AND Nova Scotia Government Employees Union

W. Brent Cotter, Arbitrator

Ronald Pink, for the union
Jonathan Davies, for the employer
April 30, 1987

ISSUES: Jurisdictional Disputes 2:3110, 5:1400; Remedies - Type of Grievance - Work Assignment Outside Bargaining Unit 2:1424, 5:1500, - Union Security 2:1426; Job Posting - Posting Procedure 5:2520; Work Assignment - Bargaining Unit Work 5:1200; Management Rights - Work Assignment 5:2000.

CIRCUMSTANCES: The Department of Transport has some salaried stock keepers in older depots within the NSGEU, but waged workers, even in the same depot, are in CUPE bargaining units. On an NSGEU employee's retirement, the position was posted as a CUPE job.

NSGEU grieved the transfer of the job out of its bargaining unit, claiming violation of the collective agreement and the Civil Service Collective Bargaining Act. The employer argued that it was within its rights in rationalizing identical jobs, that NSGEU jurisdiction was limited to salaried employees and saying the action was reasonable and in good faith.

AWARD: The grievance succeeds in part. The employer is held to be in violation of the collective agreement and the law. CUPE and the employees concerned are to be notified that NSGEU seeks re-posting as a remedy, so that they have the opportunity to make submissions. They did not have standing in the present hearing. The arbitrator retains jurisdiction to hear such submissions and to decide if the remedy of job re-posting is appropriate.

AUTHORITIES: The Civil, Service Collective Bargaining Act, S.N.S. 1978, c.3, s. 12; Trade Union Act, S.N.S., c. T-17; Re Northern Construction Co. Ltd. and Loram Construction Ltd. and Teamsters Union (1984), 15 L.A.C. (3d) 273 (Dorsey); Re Pacific Western Airlines Ltd. and Canadian Air Line Employees' Association (1984), 14 L.A.C. (3d) 435 (Munroe) and cases cited therein at p. 437; Re PCL Construction Ltd and Cascade Construction Ltd and Construction and General Workers' Local Union 1111 (1983), 8 L.A.C. (3d) 49 (Sychuk).

Dist'd: Re Canadian Pacific Air Lines Ltd. and International Association of Machinists and Aerospace Workers, Lodge 764 (C.P. Air #2) (1984), 16 L.A.C. (3d) 229 (Munroe).

DECISION 87-59

Current Electric Limited AND International Brotherhood of Electrical Workers, Local 625

William H. Kydd, Arbitrator

Fern J. Tardif, for the union
Norman Lavine, for the employer
May 13, 1987

ISSUES: Remedies - Type of Grievance - Work Assignment Outside Bargaining Unit 2:1414, 5:1500; Union Security 2:1426

CIRCUMSTANCES: The employer, while the union was being certified by the Labour Relations Board, hired a non-union electrician for 288 hours, and an apprentice for 184 hours. It had refused to honor its promise of voluntary recognition, despite notice from the Board and the union.

AWARD: The union was awarded full wages for the work assigned outside the bargaining unit. The employer was ordered to comply with the collective agreement.

AUTHORITIES: Labourers International Union and Brotherhood of Carpenters v. Landing Construction Limited et al. S.C.S. 01473 (Supreme Court of Nova Scotia, Appeal Division); Blouin Drywall Contractors Limited and United Brotherhood of Carpenters and Joiners of America, Local 246 (1975), 57 D.L.R. (3d) 199.

DECISION 87-60

Ocean View Manor AND Canadian Union of Public Employees, Local 1245

Douglas C. Stanley, Chair; John Yates and Robert Cook

Al Cunningham, for the union
Eric Durnford, for the employer
May 4, 1987

ISSUES: Interpretation - Management Rights 4:2300; Discipline and Discharge - Grounds for - Abuse of Leave of Absence 7:3120; Company Rules - Medical Examinations 7:3230; Evidence - Medical Records 7:3250; Insurance and Welfare Plans - Entitlement to Benefits 8:3320.

CIRCUMSTANCES: A nursing home worker who had been sick frequently was asked to sign a form authorizing disclosure of her medical records. She refused, whereupon the employer denied sick pay. The employer claimed its right to police those with above average absenteeism, partly to protect patients' health.The union argued this was unreasonable and discriminatory, and a form of disciplinary action. The grievor had produced a signed doctor's certificate; she refused to authorize "fishing" in her records. The employer had unilaterally added a new condition to the absence form. It had no contractual right to do so. It was reluctant to open its own medical records. In effect, employer's new policy was compulsory medical monitoring.

AWARD: The grievance succeeds and the grievor is awarded sick pay. Compulsory disclosure of private medical records existed neither in past practice nor in the collective agreement. Once satisfied of the fact of illness, the employer had no right to add new conditions for payment of a contractual benefit. However, contrary to the union's argument, the matter is not disciplinary, nor can this award support a policy grievance against the use of a disclosure clause.

Dissent: (Cook): Reasons are not given.

AUTHORITIES: Firestone Tire and Rubber Company of Canada Ltd. and United Rubber Workers, Local 113 3 L.A.C. (2d) 12 (arbitrator Wheatheril); Re Riverdale Hospital 19 L.A.C. (3d) 396.
Dist'd: EPA and International Association of Machinists 29 L.A.C. (2d) 306; Nova Scotia Nurses Union v. Halifax Infirmary Hospital 54 N.S.R. (2d) 289 (N.S.C.A.); Nova Scotia Nurses Union and Dartmouth General Hospital (unreported arbitral reward Prof. Darby 1984).

DECISION 87-61

Highland View Regional Hospital AND Canadian Union of Public Employes, Local 920

Bruce Outhouse, Arbitrator

Blaise McDonald, for the union
Laurie Sayer-Smith, for the employer
May 13, 1987

ISSUES: Supervisors - Excluded by Recognition Clause 5:1126, Bargaining Unit Work 5:1400; Bargaining Unit - Employees Excluded - Supervisors and Foremen 5:1126

CIRCUMSTANCES: In an administrative re-organization of the Employer's Environmental Services section, the supervisor of the Central Sterilizing Room (CSR), was designated as a management position, and removed from the bargaining unit. Her position within the unit was not posted. The union grieves that unit work is being performed by management staff. It argues that the CSR supervisor should not be designated as a manager within the meaning of section 1(2) (a) of the Trade Union Act. The Employer argues that the arbitrator lacks jurisdiction to deal with the issue of managerial status as this is not in issue in the wording of the grievance, and that the CSR supervisor is properly designated as a manager.

AWARD: The arbitrator found that he had jurisdiction to hear the grievance, as it was stated in sufficiently broad terms to cover the issue, and as the Employer did not claim to be prejudiced by the broader interpretation. The grievance was allowed as the Employer failed to prove, on a balance of probabilities, that the CSR supervisor exercised management functions to the extent that she would be excluded from the unit by S. 1(2) (a) of the Act. The existence of authority which would rarely if ever be exercised, and the degree of change in job function, did not justify excluding the CSR supervisor. The Employer was ordered to compensate the union for lost dues.

AUTHORITIES: Re: The Seaview Manor Home for Special Care Local of the Nurses' Union and Seaview Manor Home for Special Care (1983), unreported, (MacNeil); Re: The Halifax Infirmary Local of the Nova Scotia Nurses' Union and the Board of Directors of the Halifax Infirmary Hospital (1982), unreported (Outhouse); Re" Ontario Hydro and Canadian Union of Operating Engineers, Local 110 (1976), 12 L.A.C. (2d) 143 (Shime); Re: St. Raphail's Nursing Homes Ltd. and London and District Building Service Workers' Union, Local 220 (1975), 9 L.A.C. (2d) 441 (Brown); Re: Polymer Corp Ltd. and Oil, Chemical and Atomic Workers, Local 9-14 (1974), 5 L.A.C. (2d) 344 (Rayner); Re: Pilkington Brothers

Canada Ltd. and United Glass and Ceramic Workers (1976), 13 L.A.C. (2d) 287 (Burkett); Re: Beacen Hill Lodges of Canada Ltd. and Service Employees Union, Local 210 (1985), 20 L.A.C. (3d) 316 (McLaren); Re: Orenda Ltd. and International Association of Machinists, Lodge 1922 (1972), 1 L.A.C. (2d) 72 (Lysyk); Re: United Steelworkers, Local 3998, and Dunham-Bush (Canada) Ltd. (1964), 15 L.A.C. 270 (Lang); Re: United Electrical Workers, Local 504, and Canadian Westinghouse Company Ltd. (1964), 14 L.A.C. 279 (Reville).

DECISION 87-62

Aberdeen Hospital Commission AND The Canadian Union of Public Employees, Local 741

R. Lorne MacDougall, Arbitrator

Laurie Sayer-Smith, for the employer
Richard Fogarty, for the union
The incumbent was in attendance at the hearing.
May 15, 1987

ISSUES: Promotion, Demotion and Transfer - Demotion or Transfer - Defined 6:2100; Vacancy 5:2510.

CIRCUMSTANCES: A member of the housekeeping staff retired, with entitlement to one month's vacation and three month's retirement allowance. During this time, the incumbent who had been a "floater", was assigned the retiree's job. After the four months, a "floater" position in the housekeeping staff was posted. The grievor claims that a vacancy occurred and that the seniority provisions of the collective agreement were not followed. The Employer maintains that any vacancy created was within the classification, and not for the particular position, and that the incumbent received the position as a reassignment.

AWARD: The grievance fails. The incumbent was transferred not promoted. The employer is not limited by the collective agreement in its right to make lateral transfers. The process used to determine which worker would be transferred was fair.

AUTHORITIES: Re: International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500 (1975), 8 L.A.C. (2d) 34, (G. J. Brandt); Re: Ottawa Civic Hospital and Canadian Union of Public Employees, Local 576, (1979), 24 L.A.C. (2d) 244, (D. D. Carter); Re: Cadbury Schweppes Powell Ltd. and Milk & Bread Drivers, Dairy Employes, Caterers and Allied Employes, (1979) 16 L.A.C. (2d) 66 (K. M. Burkett); Palmer: Collective Agreement Arbitration in Canada (2d) at p. 550; Brown & Beatty Canadian Labour Arbitration (2d) at p. 271 et seq.

DECISION 87-63

Brookfield Foods Limited AND Bakery, Confectionery and Tobacco Workers' International Union, Local 446

Bruce Outhouse, Arbitrator

James Leefe, for the employer
Rene Quigley, for the union
May 21, 1987

ISSUES: Overtime - Defining Overtime - Qualifying Time 8:2130, 8:2140, Statutory Holiday 8:3130; Estoppel 2:2200, 2:2210, 2:2220; Interpretation - Words and Phrases - Hours Worked 8:2130.

CIRCUMSTANCES: The employer had formerly counted paid sick leave and statutory holidays as work time in calculating overtime. In February 1987 it discontinued this. The grievors are claiming overtime rates for time worked including sick time; without counting sick time they would not be entitled to overtime. In negotiating amendments and a new collective agreement in April and October of 1986, the employer had not indicated that it contemplated changing its practice.

AWARD: The grievance succeeds while the arbitrator accepts the employers' interpretation, that "hours worked" do not include paid sick leave or statutory holidays, it is estopped, during the current collective agreement, from changing its past practice of counting sick leave and statutory holidays towards overtime. "Hours worked" are not "hours paid", the agreement is not ambiguous, and therefore extrinsic evidence is not admissable. The union expressly asked the employer's intentions in the negotiations of April and October 1986, and because of the assurances given the employer is estopped from changing its practice during the life of the current agreement.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d) pp. 190-197 and pp. 547-8, Re: Board of School Trustees, School District No. 70 (Alberni) and Canadian Union of Public Employees, Local 727 (1981), 29 L.A.C. (2d) 129 (Christie); Re: PCL Construction Ltd. and Cascade Construction Ltd. and Construction and General Workers, Union, Local 111 (1982), 8 L.A.C. (3d) 49 (Sychuk); Re: Sudbury General Workers, Local 101, and M. Loels Ltd. (1963), 14 L.A.C. 97 (Little); Re: Brewers' Warehousing Provincial Board and Brewers' Warehousing Co. Ltd. (1957), 8 L.A.C. 35 (McCombs); Re: Lundy Steel Ltd. and United Steelworkers, Local 4140 (1975), 9 L.A.C. (2d) 105 (Brown); Re: Cement Lime & Gypsum Workers, Local 387, & Lake Ontario Portland Cement Co. Ltd. (1959), 10 L.A.C. 95 (Anderson); Labour Arbitration News (August 1974) p. 8-9.

DECISION 87-64

Her Majesty the Queen in Right of the Province of Nova Scotia (through the Agency of the Civil Service Commission) AND The Nova Scotia Government Employes Union

Bruce P. Archibald, arbitrator

Mr. Ronald Pink, for the union
Mr. Bill Wilson, for the employer
May 13, 1987

ISSUES: Discipline and Discharge - Grounds for - Refusal to Obey Instructions 7:3610, 7:3612; Management Rights - Power to Discipline 7:1000.

CIRCUMSTANCES: The grievor was given a letter of reprimand for insubordination. The union claims the individual who imposed the discipline had no authority to do so, and further, that as the grievor was never ordered to perform the work in question, her refusal is not insubordination.

AWARD: The grievance is dismissed. The administrator although appointed under the Public Service Act and not the Civil Service Act, had authority to discipline in his managerial capacity. However, the arbitrator finds that the grievor did not disobey an order and was not insubordinate. The letter of reprimand is to be removed from the grievor's file and the employer is to destroy any copies left in its possession.

AUTHORITIES: Public Service Act, R.S.N.S. 1967, c.255; Civil Service Act, S,N,S, 1980, c.3; Civil Service Collective Bargaining Act, S.N.S. 1978, c.3; Donald J. M. Brown and David M. Beatty, Canadian Labour Arbitration, 2nd ed. Canada Law Book, Aurora, 1984, p. 434; Earl E. Palmer, Collective Agreement Arbitration in Canada 2nd, ed. Butterworths, Toronto, 1983, p.320; Re: Mount Sinai Hospital and Ontario Nurses' Association (1978), 17 L.A.C. (2d) 242 (Brandt).

DECISION 87-65

Northside Harbour View Hospital Corporation AND Canadian Brotherhood of Railway, Transport and General Workers

Charles O'Connell, arbitrator

Mr. Victor Tomiczek, for the union
Mr. Phil Veinotte, for the employer
May 28, 1987

ISSUES: Skill and Ability - Arbitral Reviews - Senior Employee if Relatively Equal 6:3220; Promotion, Demotion and Transfer-Demotion or Transfer - Defined 6:2100.

CIRCUMSTANCES: The grievor argues that as he had more seniority he should have been appointed to a job which was posted. Management argues that the position involved a transfer not a promotion, and that the collective agreement was not violated.

AWARD: The grievance is dismissed. Management made a fair evaluation, and determined that qualifications were not equal. It was not necessary to apply seniority. It was determined that the job posted, while more desirable in terms of working hours, was a transfer, not a promotion.

DECISION: 87-66

Canada Post Corporation AND Canadian Union of Postal Workers

Innis Christie, Arbitrator

Wayne Mundle, for the union
Heidi Leirgon Polowin, for the employer
May 23, 1987

ISSUES: Collective Agreement - Binding Effect - Determination of 4:0000, Form and Content - Ancillary Documents 4:1200; Grievance Procedure - Compliance with 2:3120; Estoppel 2:2200.

CIRCUMSTANCES: While negotiations for the current collective agreement were taking place, the Union and the Employer signed Minutes of Settlement on a policy grievance about the hearing process for absenteeism grievances. Several months later, the current collective agreement was signed. It did not make any reference to the Minutes of Settlement; however, the practices agreed to in that document were continued for over a year before the employer notified the union that it would no longer comply with them. The Union argues that the Employer is bound by the Minutes, or, that the doctrine of estoppel precludes any change by the Employer.

AWARD: The grievance succeeds. The Employer is estopped from denying the continuing effects of the "Minutes of Settlement" so long as the current collective agreement is in effect. If the Employer's treatment of absenteeism involves discipline, the expedited arbitration process is available; if it does not involve discipline, that process is not available.

AUTHORITIES: Canada Bread Co. Limited (1970), 22 L.A.C. 98 (Christie, Chair); Board of Commissioners of Police for the

Township of Innisfil (1985), 19 L.A.C. (3d) 263 (Hinnegan); Canadian National Railway Co. et al. v. Beattie et al. (1981), 128 D.L.R. (3d) 236; Re Metropolitan Toronto Civic Employees Union, Local 43, Canadian Union of Public Employees and Municipality of Metropolitan Toronto (1985), 18 D.L.R. (4th) 742 (Alta. C.A.); Re Hawker Siddeley Canada Inc Trenton Works Division and U.S.W., Local 1237 (1983), 150 D.L.R. (3d) 509 (Nathanson, J); Brewers' Warehousing Co. Limited (1985), 21 L.A.C. (3d) 327 (Brunner), John Rennie Ltd. (1987), 26 L.A.C. (3d) 296 (Brunner); Sudbury District Roman Catholic Separate School Board (1984), 15 L.A.C. (3d) 284 (Adams); Consolidated-Bathurst Inc., Bathurst Division (1985), 19 L.A.C. (3d) 321 (Kuttner, Chair); LeBlanc, MacArthur, Price, Bourque, Gauthier; C.U.P.W. Nos. A-59-H-24,25,39,122 and 130; C.P.C. Nos. 85-1-3-4690,91,93,94 and 95 (Outhouse); Hurley, Hickey and Christopher C.U.P.W. Nos. A-57-GG-273, 396 and 403, C.P.C. Nos. (unknown) (Christie).

DECISION: 87-67

All-Wall Construction (1984) Limited AND United Brotherhood of Carpenters and Joiners of America, Local 83

William H. Kydd, Arbitrator

Mr. Ron Pink, for the Union
No one appeared for the Employer
May 29, 1987

ISSUES: Work Assignment - Contracting Out - Employees Outside Unit 5:1400; Union - Membership as Condition of Employment 7:7520.

CIRCUMSTANCES: The Employer had hired non-union workers on three jobs. The Union claimed the equivalent wages for union workers who were not hired. The Employer is bound by a collective agreement between the Union and the Construction Management Bureau Limited.

AWARD: The grievance is allowed. The Arbitrator accepted the evidence on the cost of the three jobs, and allocated 40% of that to labour costs. The union was awarded $26,615.48 as damages for violation of the collective agreement.

AUTHORITIES: Re Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 246 (1975), 57 D.L.R. (3d) 199; Labourers' International Union and Brotherhood of Carpenters v. Landing Construction Ltd. et al S.C.A. 01473

DECISION: 87-68

City of Halifax AND Halifax Civic Workers Union, Local 108

W. Brent Carter, Chair; Michael Moreash, Joseph Ross

Bruce W. Evans, for the Union
Gerald Goneau, for the Employer
April 14, 1986

ISSUES: Evidence - Documents - Production Prior to Hearing 3:1420

CIRCUMSTANCES: This is an interim matter before any hearing on the merits of the grievance. The grievance itself revolves around whether the grievor, the most senior employee, had the required skills for a job which was posted. The union is seeking various documents which relate to the skills and evaluation of the grievor and other applicants. The jurisdiction of the Board to grant an order requiring the production of documents was addressed, as well as the scope of any such order.

AWARD: The application succeeds in part. The Board determined that it had the authority to grant an order requiring the production of documents, but limited the order to those documents relating to the grievor alone, and not to any other applicant, as it is only the grievor's skills which are in question.

AUTHORITIES: Trade Union Act, S.N.S. 1972, c.19; The Public Inquiries Act, R.S.N.S. 1967, c.250; The Arbitration Act, R.S.N.S. 1967, c.12; City of Sydney v. Canadian Union of Public Employees, Local 933 (1985), 67 N.S.R. (2d) 62 (N.S.C.A.); Deuterium of Canada Ltd. v. Brown and Root Ltd. (1982), 50 N.S.R. (2d) 576 (N.S.C.A.) offing 48 N.S.R. (2d) 83 (N.S.S.C.)

DECISION: 87-69

City of Halifax AND Halifax Civic Workers' Union, Local 108

W. Brent Cotter, Chair; Michael Moreash, Joseph Ross

Bruce W. Evans, for the Union
Gerald Goneau, for the Employer
April 22, 1987

ISSUES: Skill and Ability - Arbitral Review - Senior Employee with Required Ability 6:3210, Criteria of Ability and Qualifications 6:3300, Requirements of the Job 6:3100, Examinations and Tests 6:3340.

CIRCUMSTANCES: The grievor, as senior employee, claims the Employer violated the collective agreement when it hired a new worker for a job for which the grievor had applied. The Employer argues the grievor did not have the required qualifications, and that the use of "seniority" refers to working experience, not strictly employment with the Employer.

AWARD: The grievance is dismissed. Seniority with this Employer is the only relevant seniority under the collective agreement, and the grievor is the senior employee. The qualifications required by the Employer were not unreasonable or inappropriate, the standards used were not found to be inappropriate or discriminatory, nor were they applied in a discriminatory way against the grievor. The grievor was reasonably found to be not qualified.

Addendum: Michael Moreash commented on the use of the W47.1 welding standard as an appropriate determinant for a job qualification.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.) at p.298; Union Carbide Canada Ltd. (1967), 18 L.A.C. 109 (Winter); Re Canadian Keyes Fabric Co. Ltd. and United Paperworkers International Union, Local 576 (1974), 44 D.L.R. (3d) 305 (N.S.S.C.A.O.); Re General Signal Appliances Ltd. and United Steelworkers, Local 6753 (1976), 11 L.A.C. (2d) 76 (Brown); Re Governing Council of University of Toronto and Canadian Union of Public Employees, Local 1230 (1980), 24 L.A.C. (2d) 97 (Burkett); Re St. Catherines General Hospital and Service Employees Union, Local 204 (1976), 10 L.A.C. (2d) 258 (Adams); Re Inglis Ltd. and United Steelworkers, Local 4487 (1977), 15 L.A.C. (2d) 227 (O'Shea).

DECISION: 87-70

Easco Electric Ltd. AND International Brotherhood of Electrical Workers, Local 1852

Charles O'Connell, Arbitrator

Mr. J. Bernard Boudreau, for the Union
Mr. Eric Durnford, for the Employer
June 8, 1987

ISSUES: Wages - Alteration of Wages 8:1400; Estoppel 2:2220.

CIRCUMSTANCES: At issue is whether or not the Employer is obligated to pay a per diem board allowance to union members working at Port Hawkesbury. Some of these workers had previously been employed by the grievor in Sydney, others were referred to the Employer by the Union.

AWARD: The Employer had paid an allowance to two men; their grievances are dismissed. Two men had voluntarily waived their right to the board allowance in exchange for the work at Port Hawkesbury; by their conduct they are estopped and their grievances dismissed. Three men were not yet union members at the time of filing of the grievance; their claims are dismissed. The final two claims are successful but are limited retroactively to the seven days prior to filing.

AUTHORITIES: Steen: Construction Association Management Labour Bureau Limited and International Brotherhood of Electrical Workers, Local 625 (MacDougall); G. & S. Masonry Limited and International Union of Bricklayers & Allied Craftsmen (Clarke); Yorkdale Drywall Limited and United Brotherhood of Carpenters and Joiners of America, Local 83 and Bruce Outhouse (Burchell, J.).

DECISION: 87-71

City of Dartmouth **AND** Nova Scotia Union of Public Employees, Unit # 4

R. Lorne MacDougall, Chair; Eric B. Durnford, John D'Orsay.

Ronald A. Stockton, for the Union
Patricia Richards, for the Incumbent
Michael H. Moreash, for the Employer
June 20, 1987

ISSUES: Skill and Ability - Arbitral Review - Senior Employee With Required Ability 6:3210, Criteria of Ability and Qualifications - Education 6:3320; Requirements of the Job 6:3100.

CIRCUMSTANCES: Grievor, as senior employee, claims that he should have been awarded a position of Planner 1 which was awarded to another. The employer claims that the grievor lacks an essential qualification, membership in the Canadian Institute of Planners. While the grievor is eligible to join the Institute as a "Provisional" member, he lacks the experience to qualify for full membership. The employer argues that the qualification was intended to refer to full membership as this relates directly to the status and experience of a planner.

AWARD: The grievance is denied. The requirement for full membership in the Canadian Institute of Planners is reasonable taking into account what is expected of the employee in the discharge of the position's responsibilities.

DECISION: 87-72

Halifax Industries Limited **AND** International Union of Marine and Shipbuilding Workers of Canada, Local 1.

J. A. MacLellan, Arbitrator

Brian Johnston, for the Employer
Gordon Forsyth, for the Union
June 29, 1987

ISSUES: Discipline and Discharge - Grounds for - Refusal to Obey Orders 7:3610; Alcoholic Beverages 7:3560; Disciplinary Penalties - Arbitral Review - Substitution of Penalty 7:4000, Mitigating Factors - Employment Record 7:4428, Rehabilitative Potential 7:4422.

CIRCUMSTANCES: Upon returning to work from an Alcohol Dependency Program, the Grievor was assigned to work in the Steel Yard, and not in his former work area, General Stores. The grievor was unhappy and claimed that he did not have any work to do in the Steel Yard. The Union was able to arrange that the grievor would be able to work in the Joiner's Shop beginning the next week, however, the grievor was still unhappy and requested the balance of the week off without pay. The Employer refused, and the grievor went home for the rest of that day. The next day, the grievor was again ordered to work in the Steel Yard, and he again refused, whereon he was discharged. The grievor seeks reinstatement and compensation for all lost wages.

AWARD: The grievance succeeds in part. The grievor is to be reinstated as a probationary employee within a week of the date of this award. The probationary period is not to exceed 9 months. The grievor is to place himself under continuing counselling for his alcohol problem. If, during the probationary period, the grievor drinks at work or is under the influence of alcohol at work, the Employer may discharge him. The normal grievance-arbitration procedure is open to the grievor, but if the Employer shows that the grievor was influenced by alcohol, etc., then the grievor may not challenge the discharge as appropriate discipline. No monetary compensation is awarded. The award reflects the grievor's long history of employment with the Employer, his unblemished record until 1985, and his genuine efforts to rehabilitate himself.

DECISION: 87-73

National Sea Products Limited **AND** The Canadian Seafood and Allied Workers' Union, Locals 101, 105, 106, 112, and 116 CLC

Bruce Outhouse, Chair; Rick Clarke, Eric Durnford.

Ronald Pink, for the Union
Donald McDougall, for the Employer
June 30, 1987

ISSUES: Overtime - Defining Overtime - Weekly Overtime 8:2120; Evidence - Types of Evidence - Extrinsic Evidence - Negotiating History 3:4420, Past Practice 3:4430; Interpretation - Ambiguity 3:4400, 3:4410, Intention of the Parties 4:2100; Past Practice 3:4430.

CIRCUMSTANCES: This is a policy grievance filed to determine the correct interpretation of provisions relating to compulsory overtime and overtime shift premiums. At issue is whether frequently occurring "shift extensions" of from 10 minutes to up to an hour and a half should be treated in the same manner as three hour "mini-shifts" which are sometimes scheduled in order to meet production requirements, and which take place after the regular shift and an intervening meal break.

The "Escalator" or shift premium clause refers to "these three hour night time shifts", while the compulsory overtime provisions refer to "overtime assignments".

The Employer argues that in each case only the "mini-shifts" are included, and presents evidence of past practice and negotiating history to resolve any ambiguity. The Employer also argues that as the Union has accepted the Employer's practice for 12 years it cannot now seek an alternate interpretation.

AWARD: The grievance is dismissed. The language of the provisions is ambiguous, and the evidence of past practice and negotiating history support the Employer's argument that the shift premiums apply only to the three hour mini-shifts, and not to shift extensions. However, the compulsory overtime provision does not attempt to single out the mini-shifts, and therefore refers to all overtime assignments, including the shift extensions. As the union can demonstrate no breach of this provision, the grievance is dismissed.

AUTHORITIES: Re: City of Lethbridge and Canadian Union of Public Employees, Local 70 (1976), 26 L.A.C. (3d) 81 (England); Leitch Gold Mines Ltd. et al v. Texas Gulf Sulphur Co. (Inc.) et al (1968), 3 D. L.R. 161 (Ont. H.C.) at pp. 215-216.

DECISION 87-74

Bridgeside Building Centre Ltd. AND United Food and Commercial Workers Union, Local 1973

Peter E. Darby, Arbitrator

Raymond F. Larkin, for the Union
Donald W. J. Munro, for the Employer
June 22, 1987

ISSUES: Recall 6:2354, Seniority 6:2000; Seniority-Applications - Recall 6:2000, 6:2354.

CIRCUMSTANCES: After the grievor was laid off the employer hired another work at first on a casual ad hoc basis, but on a more permanent basis after February 23, 1987. The grievor claims that he should have been recalled as he had seniority and could do the work, for both the ad hoc, part-time work available and later the full-time work.

AWARD: The grievance succeeds. The grievor is ordered to be reinstated and to receive compensation for the period from February 23, 1987 to May 2, 1987, when the grievor obtained other employment. The arbitrator retains jurisdiction to deal with the amount of the award if necessary.

DECISION 87-75

City of Dartmouth AND Nova Scotia Union of Public Employees, Unit # 1

Peter E. Darby, Chair; John O'Orsay; Eric Durnford

Ronald A. Stockton, for the Union
Michael H. Moreash, for the Employer
June 29, 1987

ISSUES: Overtime - Premium 8:2140; Management Rights - Overtime 5:3210; Leave of Absence 7:3120.

CIRCUMSTANCES: The collective agreement provided for equal time off in lieu (TOIL) of overtime hours worked on dates to be "mutually agreed". The grievor was denied TOIL for the date he requested and was instead paid at the appropriate rate. The employer denied the request pursuant to its policy of not assigning other workers overtime hours to enable workers to take TOIL.

AWARD: The grievance is dismissed. The employer acted reasonably in its decision to refuse the grievor's request, as it acted according to policy, and offered the grievor a shift-change for the specific date, which he refused. Unless both parties agree, TOIL cannot be taken.

AUTHORITIES: Webster's Second International Dictionary, 1971; Re U.A.W. and Office and Professional Employees International Union, Local 343 (1978), 17 L.A.C. (2d) 348 (Shime).

DECISION 87-76

National Sea Products Limited AND Canadian Seafood and Allied Workers Union

J. A. MacLellan, Arbitrator

Ronald Pink, for the Union
Camille Cameron, for the Employer
July 7, 1987

ISSUES: Discipline and Discharge - Grounds for-Untrustworthiness 7:3330; Evidence - Burden of Proof-Applications - Discipline 7:2300.

CIRCUMSTANCES: Following complaints by other workers about perceived irregularities in weighing procedure by the grievors, an investigation was conducted by the employer. The grievors were discharged, but this was changed to a three week suspension. The grievors are seeking lost wages and benefits.

AWARD: The grievance succeeds. Based on the testimony and evidence, the arbitrator is not satisfied, on the balance of probabilities, that the grievors committed theft. They are to be reimbursed for lost wages and benefits and the record of suspension to be removed from their files.

DECISION 87-77

Consolidated Aluminum Glass Limited AND International Brotherhood of Painters and Allied Trades, Local 1439.

William H. Kydd, Arbitrator

Mr. Gordon Forsythe, for the Union
No one appeared as a representative of the Employer
July 10, 1987

ISSUES: Union - Security - Checkoff 9:1200

CIRCUMSTANCES: The union sought dues from March 1, 1987 and contributions from January 1, 1987 to date, due under the collective agreement. Evidence was presented to show the amounts owing, and that the Employer is a successor to another company to which the Union was the bargaining agent.

AWARD: The grievance succeeds. The Union is recognized as the successor, and the amounts owing are specified.

AUTHORITIES: Kelly Douglas (1974) Canadian Labour Relations Reports, p. 77; Emresk Plastics Inc. (1982) Can. L.R.B.R. 1963; Re Burd Hotel (1983) 13 L.A.C. (3d) at 230.

DECISION 87-78

Maritime Employers Association AND Halifax Longshoremen's Association, Local 269, I.L.A.

Mr. Justice F. B.William Kelly, In Chambers

Gerald McConnell, Gordon Forsythe, for the Union
George W. MacDonald, Ian C. Holloway, for the Employer

A Chambers applications by the Union from an arbitration award of Judge J. A. MacLellan dated November 6, 1986.

ISSUES: Judicial Review 1:5000, Ground for Review - Excess of Jurisdiction 1:5300.

CIRCUMSTANCES: The dispute arose as to whether a new method of unloading grain constituted a new operation such as would re-open the issue of manning for that operation in accordance with the provisions of the collective agreement. The arbitrator ruled that it was a new operation, and that no longshoremen were needed for the new unloading process. The union bases its appeal on whether or not the arbitrator had initial jurisdiction, ie. was there a "new operation"?

AWARD: The application is denied. The arbitrator had jurisdiction to determine whether or not a "new operation" was involved. Evidence was heard and weighed. The finding as to manning is not patently unreasonable, nor is there any suggestion of misconduct that would create reviewable error.

AUTHORITIES: Canada Labour Code R.S.C. 1970, C.L.-1; Re Syndicat Des Employees De Production Du Quebec et De L'Acadie and Canada Labour Relations Board, et al, (1985) 14 D.L.R. (4th) 457 (S.C.C.); Canadian Broadcasting Corporation v. National Association of Broadcasting Employees & Technicians (1985), 70 N.S.R. (2d) 184, 166 A.P.R. 184; Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin et at (1973), 41 D.L.R. (3rd) 6 at 11; Standard Paving

Maritime Ltd. v. City of Halifax (unreported), S.H. No. 28121, May 21, 1981 (Clarke).

DECISION 87-79

George L. Mitchell Electric Ltd. AND International Brotherhood of Electrical Workers, Local 625

J. A. MacLellan, Arbitrator

Gordon Forsyth, for the Union
C. Mark Cleary, for the Employer
July 10, 1987

ISSUES: Work Assignment - Contracting Out - Employees Outside Unit 5:1400; Contracting Out 5:1300; Interpretation - Aids to-Statutes 4:2230.

CIRCUMSTANCES: The Union is claiming that non-union members performed work which should have rightly been allocated to union members as being repair work. The Employer argues the work done was of a service or maintenance nature and therefore not required to be performed by union members. (The Employer is only bound in the construction and industrial sector).

AWARD: The grievance succeeds. The work was repair work and falls within the definition of construction industry work performed in the industrial and commercial sectors. The Employer is ordered to compensate the union for the hours worked on these jobs by non-union employees.

AUTHORITIES: Trade Union Act, S.N.S. 1972, c.19; Sask and Mitchell, Ontario Labour Relations Board Law and Practice (1985) at p. 578-9; United Brotherhood of Carpenters and Joiners of America, Local 83 - Yorkdale Drywall Limited N.S.S.C.A.O., S.C.A. 01711, unreported, 30 June, 1987.

DECISION 87-80

Civil Service Commission AND Nova Scotia Government Employees Union

T. A. Cromwell, Arbitrator

R. Pink, for the Union
J. Davies, for the Employer
May 25, 1987

ISSUES: Jury and Witness Duty 8:3600; Estoppel 2:2200, 2:2210, 2:2220

CIRCUMSTANCES: The grievor seeks reimbursement of money which was deducted from her salary pursuant to a provision of the collective agreement which provides for paid jury leave. The money is the amount the grievor received as her jury duty fee. The grievor believed that so long as the money was used for expenses, she did not have to turn it over to her employer. The Employer's policy is not to seek reimbursement of money paid specifically for expenses, such as the mileage allowance.

AWARD: The grievance is dismissed. The Employer did not waive its right to reimbursement under the collective agreement, and although the doctrine of estoppel is available, it does not apply as the Employer did not promise to forego its rights; nor was there any course of conduct which would make it inequitable to allow the Employer to enforce its rights.

AUTHORITIES: The Juries Act S.N.S. 1969, c.12; Re Lornex Mining Corp. Ltd. and United Steelworkers (1974), 6 L.A.C. (2d) 353; Hawker Siddeley Canada v. United Steelworkers of America (1983), 59 N.S.R. (2d) 29 (N.S.T.D.); N.S.G.E.U. v. Civil Service Commission (Sept. 11, 1986, Outhouse); Combe v. Combe, (1951) 1 All E. R. 767 at 769-70; Re CN/CP Telecommunications (1981), 4 L.A.C. (3d) 205 at 207-208.

DECISION 87-81

Dartmouth District School Board AND Nova Scotia Teachers Union

Chief Justice Constance R. Glube, N.S.S.C.T.D. (In Chambers)

Lorraine Lafferty, for the Union
M. Moreash, for the Employer
June 24, 1987

An application by the Union to set aside an arbitration award of R. Lorne MacDougall, dated January 19th, 1987. (See 87-07)

ISSUES: Judicial Review 1:5000, Grounds for - Excess Jurisdiction 1:5300; Seniority - Applications - Recall 6:2000, 6:2200; Skill and Ability - Arbitral Review - Senior Employee with Required Ability 6:3110.

CIRCUMSTANCES: Vacant teaching positions were awarded to a term contract teacher with less seniority than either of the grievors and to a substitute teacher with no seniority. The arbitrator ruled that the substitute teacher's experience qualified her for one position, but awarded the other position to the senior grievor. The Union seeks an order setting aside the decision of the arbitrator as it relates to the substitute teacher arguing that awarding a position to a teacher without seniority over a qualified term contract teacher was an error of jurisdiction, and that the two vacant positions should have gone to the two senior term contract teachers, ie. the grievors. The Employer seeks an order stating the seniority provisions of the collective agreement do not apply to term contract teachers.

AWARD: The application of the Union is granted and that of the Employer is denied. The arbitrator correctly applied the seniority provisions to term contract teachers but erred in grouping a substitute teacher with the term contract teachers.

AUTHORITIES: Education Act, R.S.N.S. 1967, c.81; Teacher's Collective Bargaining Act, S.N.S. 1974, c.32; United Automotive Workers, Local 720 v. Volvo Canada Limited (1979) 33 N.S.R. (2d) 22 (S.C.C.); Canadian Keyes Fibre Company Limited v. United Paperworkers International Union, Local 576 (1974) 8 N.S.R. (2d) 81 (N.S.C.A.).

DECISION 87-82

Civil Service Commission AND Nova Scotia Government Employees Union

Bruce Outhouse, Arbitrator

Kimberley Turner, for the Union
Jonathan Davies, for the Employer
June 29, 1987

ISSUES: Discipline and Discharge - Grounds for - Refusal to Obey Instructions 7:3610, 7:3612.

CIRCUMSTANCES: The grievor was suspended for two days for insubordination. The central issue involved the question of whether or not a clear order was given to the grievor and was understood. The conversations and communications surrounding the incident are outlined, including the grievor's conduct on being reprimanded.

AWARD: The grievance succeeds. The arbitrator is not satisfied from the evidence that an unequivocal order was given to the grievor. As the discipline was imposed solely for the insubordination and not for the grievor's conduct on being reprimanded, the Employer is order to reimburse the grievor for any pay and benefits lost and to remove the letter of discipline from her file.

AUTHORITIES: Re N.S.G.E.U. on behalf of Valerie Rogers and C.S.C. (May 13, 1987) unreported (Archibald); Re Fanshave College and Ontario Public Service Employers' Union (1976), 12 L.A.C. (2d) 189 (O'Shea); Re Mueller Ltd. and United Automobile Workers, Local 456 (1974), 7 L.A.C. (2d) 282 (Hinnegan); Re Firestone Steel Products of Canada and United Automobile Workers, Local 27 (1975), 8 L.A.C. (2d) 64 (Brandt); Re Sauder Industries Ltd. and International Woodworkers of America, Local 1-217 (1985), 21 L.A.C. (3d) 245 (McKee).

DECISION 87-83

Her Majesty the Queen in Right of the Province of Nova Scotia (through the Agency of the Civil Service Commission) AND Nova Scotia Government Employees Union

Bruce P. Archibald, Arbitrator

Ronald Pink, for the Union
Bill Wilson, for the Employer
June 29, 1987

ISSUES: Discipline and Discharge - Just Cause 7:1200, Professional Employees - Standard of Conduct 7:3520, 7:4400 fn 890; Disciplinary Penalties - Progressive Discipline 7:4422, Arbitral Review - Substitution of Penalty 7:4000.

CIRCUMSTANCES: The grievor, a hospital pharmacist, received a three day suspension without pay after disengaging all telephone lines to the pharmacy late one evening in order to cope with a backlog of prescription orders to be filled. The Union claims the grievor has been disciplined without just cause, that he was exercising professional judgement by attempting to shut out unwanted interruptions. The Employer argues that it is part of the grievor's duties to distribute drug information, and that the grievor's actions posed a potentially serious risk to patients, although it is admitted no actual harm occurred. The grievor, as a professional, may be held to a higher standard of care. The Employer argues the discipline imposed is appropriate in view of the standard of conduct it expects. The Employer has since made a formal policy to avoid a repeat occurrence.

AWARD: The grievance is partially successful. The grievor's conduct was a breach of the standards of service which the Employer might reasonably expect of a professional pharmacist. In the absence of harm or a need for deterrence, the principle of progressive discipline may be applied. The grievor is to be compensated for the three day suspension, but a letter of warning about this incident may be placed in his employment file by the Employer.

AUTHORITIES: Donald J. M. Brown and David M. Beatty, Canadian Labour Arbitration, Canada Law Book, Aurora, 1984, at p. 335, 415-416; Civil Service Collective Bargaining Act, S.N.S. 1978, C.3. S.38(4); Lockhead Aircraft Corp. (1957), 28 L.A. 829 at 831

;(William M. Hepburn); Earl Palmer, Collective Agreement Arbitration Canada (2d ed.), Butterworths, Toronto, 1983, with Supplement 1986 at p.279; Livingston/Industries Ltd. (1982), 6L.A.C. (3d) 4 (Adams); Owen Sound General & Marine Hospital (1973), 16 L.A.C. (2d) 11 (Abbott); North York General Hospital (1973), 5 L.A.C. (2d) (Shime); Brewers' Warehousing Co. Ltd. (1973), 4 L.A.C. (2d) 40 (Johnston); Leisure World Nursing Homes Ltd. L.A.N. January 1975 (Adams); Northern Electric Co. Ltd. L.A.N. December 1973 (Weatherill); Re Ocean Harvesters Ltd. and Newfoundland Fishermen, Food and Allied Workers Union, Local 1252, (1980), 117 D.L.R. (3d) 230 (Nfld. S.C.T.O.), affd. 130 D.L.R. (3d) 516 (C.A.), leave to appeal to S.C.C. refused 43 N.R. 264n.

DECISION 87-84

Texaco Canada Inc. AND Atlantic Oil Workers, Local No. 1

Bruce Outhouse, Chair; John D'Orsay, Gregory North

Ronald Stockton, for the Union
John Merrick, for the Employer
July 14, 1987

ISSUES: Occupational Health and Safety Act, S.N.S. 1985, c.3; Discipline and Discharge - Grounds for - Refusal to Obey Instructions 7:3610, 7:3612, Health and Safety 7:3621; Safety-Refusal to Obey Order 7:3621.

CIRCUMSTANCES: The grievor received a written reprimand for refusing to promptly carry out a work assignment and for an earlier unrelated incident. The Union alleges the Employer has breached the collective agreement, its own right to refuse policy, and the Occupational Health and Safety Act by requiring the grievor to perform work which he reasonably believed to be unsafe. The Union argues the grievor was unjustly disciplined for the delay in the work while he discussed his concerns with the union and Employer representatives. The Employer argues the grievor had no reasonable cause to believe the performance of the work would present any danger to himself or others.

AWARD: The grievance is dismissed, except that reference to any mention in the disciplinary letter of the unrelated incident some months earlier is to be deleted. The majority of the Board found that the grievor did refuse albeit temporarily, to perform work assigned, and that while such refusal could be justified if the grievor had reasonable cause to believe the work would endanger his own health or safety, or that of others, in the circumstances, the grievor did not have reasonable cause.

DISSENT: (John D'Orsay) The grievance should be upheld. The grievor acted out of a genuine concern for health and safety, based on the information available to him. The reprimand constitutes disciplinary action contrary to s.25 of the Occupational Health and Safety Act.

AUTHORITIES: Occupational Health and Safety Act, S.N.S. 1985, c.3; Brown and Beatty, Canadian Labour Arbitration (2d ed.) 443, 478; Re Steel Company of Canada Limited and USW, Local 1005 (1975), 8 L.A.C. (2d) 375 (Palmer); Re Alan Miller and Canadian National Railways, (1980) 2 Can. LRBR 344; Re Corporation of the Borough of North York and Canadian Union of Public Employees, Local 373 (1979), 20 L.A.C. (2d) 289 (Schiff); Re Brunswick Bottling Limited and Retail, Wholesale & Department Store Union, Local 1065 (1984), 16 L.A.C. (3d) 249 (Iwanicki); Re Nova Scotia Government Employees Union on behalf of Robert Estrabrooks and Civil Service Commission (January 3, 1986), unreported, (Outhouse); William Gallivan (1981) 45 di 180 (C.L.R.B.); Baltimore Air Coil v. Walter Doupayne (1982) 3 Can. LRBR 166; Matheson & MacMillan v. Minister of Finance (unreported P.E.I. S.C.T.D. No. GDC - 6304).

DECISION 87-85

Eastern Plymouth Chrysler Ltd. AND Canadian Brotherhood of Railway, Transport & General Workers, Local 506.

Judge Robert F. Ferguson, Arbitrator

Bernard Boudreau, for the Union
Simon J. Khattar, for the Employer
July 14, 1987

ISSUES: Lay-off - Disability 7:3200, 7:3240, Loss of Insurance 7:7510.

CIRCUMSTANCES: The grievor, a mechanic, lost his driver's license for a period of one year. The Employer suspended the grievor's employment, not for any disciplinary cause, but because possession of a valid driver's license is considered essential for performance of the grievor's work. The Employer agreed to rehire the grievor after his license was returned without loss of seniority. The grievor seeks to return to work arguing that the Employer has no authority to lay him off, that the license was not an essential part of his qualifications, and that alternate arrangements could be made for co-workers to perform any driving required.

AWARD: The grievance is dismissed. The grievors' suspension is not a "lay-off" in the terms of the collective agreement, but a suspension of his employment during the time he cannot fully discharge his employment responsibilities. The Employer's insurance coverage required its employees to have valid drivers licenses, and driving is an integral part of the grievor's duties. To order the Employer to re-arrange its operations to accommodate the grievor for a year would greatly affect the Employer. The Employer has acted within its rights and in a fair and reasonable manner.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2d ed) p.368.

DECISION 87-86

Simmons Limited (Dartmouth Division) AND Energy and Chemical Workers Union, Local 825

R. Lorne MacDougall, Arbitrator

Kevin A. McCaskill, for the Employer
George Morrison, for the Union
July 28, 1987

ISSUES: Discipline and Discharge - Grounds for - Absence from Work 7:3100, Lateness 7:3140.

CIRCUMSTANCES: The Employer had instituted a progressive disciplinary policy on lateness and absenteeism. The grievor was limited to very specific "allowable" infractions because of her past record. Following an authorized absence for a dental appointment, the grievor did not report for work the following day. She called in twice, first to say she would not be in for the morning, and later for the rest of the day. She did not produce a dentist's certificate. At a meeting the next day the Employer discharged the grievor for breaking the conditions of attendance set. At this meeting, the grievor intimated that she had been to see a lawyer and to attend a funeral the previous day, both of which were untrue. The grievor seeks to be reinstated.

AWARD: The grievance succeeds. The grievor is to be reinstated within 10 days of the date of this award, but without any compensation or damages.

AUTHORITIES: Re City of Dartmouth and Nova Scotia Union of Public Employees, (1980), 27 L.A.C. (2d) 97 at 101-2.

DECISION 87-87

Cape Breton Development Corporation **AND** United Mine Workers

Leo MacIntyre, Arbitrator
July 24, 1987

ISSUES: Illness or Disability - Employer Response - Discipline- Absenteeism 7:3200, Effect on Employee - Ability to do Job 7:3220

CIRCUMSTANCES: The grievor was discharges for his failure to attend work on a regular basis over several years. The grievor seeks to be reinstated or placed on pension or to be placed back on the Employment Roll of the Employer. The Employer maintains that it has acted properly in discharging the grievor, and that no suitable alternative employment is available.

AWARD: The grievance fails. The grievor failed to provide a credible reason for his "deplorable" attendance record, nor was any evidence led which might indicate future improvement. The employer and union were unable to find alternative employment. The arbitrator does not have jurisdiction to order the grievor be placed on pension.

AUTHORITIES: Canada Post Corporation and Canadian Union of Postal Workers 1986, L.A.C. (3rd) at 385.

DECISION 87-88

Maritime Telegraph **AND** Telephone Employees' Union

W. Brent Cotter, Arbitrator

Nancy I. Murray, for the Union
Terry L. Roane, for the Employer
July 27, 1987

ISSUES: Skill and Ability - Arbitral Review - Senior Employee With Required Ability 6:3210, Criteria of Ability and Qualifications - Bona Fides of 6:3300, Requirements of the Job 6:3100.

CIRCUMSTANCES: The grievor as senior employee claims to be entitled to a position which was posted. A requirement for the position was stated to be typing skills, which the grievor admits he does not have. The union argues that this requirement does not match the actual requirements of the job, and claims therefore the grievor should be awarded the position. The employer argues that the requirement is a bona fide one, given the present state of the job and further planned computerization.

AWARD: The grievance is dismissed. Based on the present job requirements, the typing qualification is not unreasonable. The grievor does not possess this qualification, and therefore was not entitled to further consideration for the position.

AUTHORITIES: Re Westeel Products (1960), 11 L.A.C. 199 (Laskin); Re Union Carbide Canada Ltd. (1967), 18 L.A.C. 109 at p. 118 (Weiler); Re Reynolds Aluminum Co. of Canada Ltd. and Int'l. Molders and Allied Workers Union, Local 28 (1974), 5 L.A.C. (2d) 251 at 254 (Schiff); Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union (1985), 22 L.A.C. (3d) 42 (Outhouse); Re Island Telephone Company ltd. and International Brotherhood of Electrical Workers, Local 1030 (1983), 8 L.A.C. (3d) 132 (Christie); Re Goodyear Tire and Rubber Co. of Canada Ltd. and United Rubber Workers, Local 189 (1973), 2 L.A.C. (2d) 438 (Brown); Brown and Beatty, Canadian Labour Arbitrations (2nd ed.) (1984) at p.298, fr 203; Re Nova Scotia Government Employees Union and Civil Service Commission, unreported Oct. 24, 1986 (Outhouse); Re Scarborough General Hospital and Canadian Union of Public Employees, Local 1487 (1979), 23 L.A.C. (2d) 190 (Swan).

DECISION 87-89

Cape Breton Development Corporation **AND** United Mine Workers

Leo MacIntyre, Arbitrator
July 28, 1987

ISSUES: Overtime 5:3200, Right to Claim 5:3220, Management Rights 5:3210, 5:3220

CIRCUMSTANCES: The grievor claims overtime for one shift which was assigned to another worker when one of the regular shift workers was absent.

AWARD: The grievance is denied. The grievor has not established that the Employer was under any obligation to call him out as the grievor was not a member of the regular shift.

AUTHORITIES: Canadian Labour Arbitration, Brown and Beatty (2d ed) p. 252-253.

DECISION 87-90

Scotia Marine Products (1983) Inc. **AND** Energy and Chemical Workers Union, Local 856

J.A. MacLellan, Arbitrator

George Morrison, for the Union

Peter McLellan, for the Employer
August 12, 1987

ISSUES: Vacancy 5:2510, Job Posting 5:2510

CIRCUMSTANCES: A student was hired to fill in for an employee on maternity leave. The union argues that this position should have been posted. The employer argues that a finite absence does not create a vacancy, and therefore need not be posted.

AWARD: The grievance is denied. Upon reading the entire agreement and heaving heard the way the parties have applied the relevant articles, the arbitrator concluded that a temporary leave of absence does not create a situation requiring job posting.

DECISION: 87-91

Shermith Investment Limited (Keddy's Motor Inn) **AND** The Hotel Employees and Restaurant Employees International Union, Local 772.

Charles O'Connell, Chair; Earl Wadden, Gerald Yetman.

Tom Rees, for the Union
George Khattar, for the Employer
August 25, 1987

ISSUES: Discipline and Discharge - Grounds for - Work Performance - Carelessness 7:3610; Disciplinary Penalties-Culminating Incident 7:4310, 7:4312.

CIRCUMSTANCES: The grievor was discharged for damaging the company snow removal vehicle by driving it in a careless manner. The grievor seeks reinstatement with compensation for lost wages. The Employer relies on the doctrine of the culminating incident.

AWARD: The grievance succeeds in part, as the grievor is awarded compensation of $2800.00 but is not reinstated as the majority of the Board was satisfied "it would not be in the best interests of the grievor or employer to do so".

The Board found that the grievor's conduct was at best ordinary negligence, as there was no evidence that he maliciously or deliberately damaged the snow plow. The incident on its own does not warrant dismissal. It was accepted as a possible culminating incident, and the other incidents were reviewed. The Board was satisfied that none of these incidents met the criteria for being incidents under the doctrine of culminating dismissal.

DISSENT: (Yetman) Mr. Yetman feels that there was no justification for not reinstating the grievor, and would order the grievor to be reinstated.

DECISION: 87-92

Civil Service Commission and the Nova Scotia Union of Government Employees Union

Bruce Outhouse, Arbitrator

Ronald Pink, for the Union
Jonathan Davies, for the Employer
July 13, 1987

ISSUES: Work Assignment - Changes in Job Function 5:2410, Compliance with Wage Structures 5:2400.

CIRCUMSTANCES: The grievor, a Secretary I to the Director of the Western Health Unit, seeks Acting Pay for the Director's position on the basis of performing the administrative duties of the position in the time between the retirement of the former Director and the appointment of a new Director. Alternatively, the grievor seeks Acting Pay for the position of Secretary II, as the duties of her position normally involve duties and responsibilities suited to that classification.

AWARD: The grievance fails as the grievor did not perform the core functions of the Director. The Employer acknowledges that the grievor had been improperly classified for some time, and has been re-classified as a Secretary II pursuant to a general classification review. However, this does not entitle the grievor to any compensation as the Acting Pay provisions are not applicable to situations of improper classification, and cannot be used to provide a remedy for such a situation. The Arbitrator appreciates the grievor's complaint, but has no remedy available.

DECISION: 87-93

Piercey Supplies Limited AND Teamsters, Chauffeurs, Warehousemen, Helpers & Miscellaneous Workers, Local 927

J. A. MacLellan, Arbitrator

Thomas Pittman, for the Union
Karin McCaskill, for the Employer
September 8, 1987

ISSUES: Skill and Ability - Arbitral Review - Senior Employee With Required Ability 6:3210, Criteria of Ability and

Qualifications - Bona Fides of 6:3300, Requirements of the Job 6:3100.

CIRCUMSTANCES: The grievor claims that as more senior employee he should have been awarded a position which was awarded to another employee. The Employer claims that after determining that the grievor and the other applicants did not have the qualifications for the job, it was entitled to approach other employees to get them to apply for the job. One of these employees was eventually awarded the position.

AWARD: The grievance is dismissed. The Employer was reasonable in the qualifications it set for the job, and the grievor does not meet the standards set.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, (2d ed.), p.295.

DECISION: 87-94

Ron MacGillivary Chev-Olds Limited **AND** The Canadian Brotherhood of Railway, Transport & General Workers, Local 525

J. A. MacLellan, Arbitrator

Ted Powell, for the Union
Ron MacGillivary, for the Employer
September 1, 1987

ISSUES: Discipline and Discharge - Grounds for - Theft 7:3310.

CIRCUMSTANCES: The grievor and other mechanics had been for many years in the habit of salvaging from materials at the garage items which they could find a use for, before these items were sent to the dump. The grievor was discharged for attempting to remove some items of negligible value without asking permission to do so. The grievor claimed that he was unaware of a new policy of mandatory permission, and claimed that he was under the impression that so long as he did not do "salvage" work on the employer's time, it was permissible to salvage items which would otherwise be discarded at the dump. The Employer claims that there was a mandatory requirement that permission should be obtained before anything be removed from its premises.

AWARD: The grievance succeeds. The arbitrator accepts that the grievor was genuinely unaware of the change in policy. Given the long-standing nature of the "salvage" practice, and the grievor's otherwise good work record, discharge is too severe a penalty. A warning about failure to seek permission before removing items is to be placed in the grievor's file, and the grievor is to be reinstated, and compensated for lost wages and benefits.

DECISION: 87-95

National Sea Products Limited **AND** The Canadian Seafood & Allied Workers' Union

J. A. MacLellan, Chair.; Gerald Yetman, Eric Durnford

Raymond Larkin, for the Union
Donald McDougall, Camille Cameron, for the Employer
Sept. 1, 1987

ISSUES: Medical Examinations 7:3230; 8:3342; Company Rrules-Reasonableness 4:2300; Occupational Health and Safety Act, SNS. 1985 c.3

CIRCUMSTANCES: After returning to work from two consecutive one-year leaves of absence for union activities, the grievor was assigned to a job which involved heavy labour. The Employer requires employees returning from a variety of health-related leaves or absences to undergo "health assessments". The grievor claims this a breach of the collective agreement, as he was not absent for a health-related reason. The grievor also objects to the detailed nature of the information in the health assessment, much of which is of questionable relevance for the employer's purposes. The employer argues that it has an interest in assuring that the grievor is fit for his position, and asserts that the health records are treated confidentially. The grievor seeks to have the health assessment withdrawn from his file and destroyed.

AWARD: The grievance is dismissed. The parties basically agree that health assessment are justified if there are reasonable grounds relating to the health of an employee for such tests to be conducted. In the circumstances of the case, the majority of the Board finds that the Employer did have reasonable grounds for ordering a health assessment of the grievor. Further, the majority also noted that the Occupational Health and Safety Act imposes an obligation on employers to ensure the health and safety of employees. The majority felt that the relevance of some of the information in the health assessment was debatable, but felt that the parties could better resolve this through negotiations. Finally, the majority commented on the confidentiality aspect, noting that while the employer treats health records as confidential, the Employer should take whatever steps necessary to reassure the employees that such information is held in strict confidence.

DISSENT: Mr. Yetman: As the grievor was not returning to employment after any health-related absence, the employer was not justified in requiring him to undergo a health assessment. Mr. Yetman would allow the grievance.

DECISION 87-96

Civil Service Commission AND The Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the Union
Reinhold M. Endres, for the Employer
September 1, 1987

ISSUES: Innocent Absenteeism 7:3210; Interpretation - Words and Phrases - May 4:2100.

CIRCUMSTANCES: The grievor has been discharged for excessive absenteeism. It is not disputed that these absences are health-related. The Union argues that because there are provisions for short - and long-term disability leaves, the doctrine of innocent absenteeism is not applicable. The employer argues that notwithstanding the provisions for such leaves, the doctrine is available, and that there is just cause for dismissal. The employer also argues that as these provisions use the word "may" that it has discretion in awarding these benefits. The union argues that the grievor should be reinstated for the purposes of qualifying for short and long-term disability leaves.

AWARD: The grievance is allowed. Through negotiations the parties have set up disability leave plans for such situations as this. The doctrine of innocent absenteeism is not available so long as the grievor is entitled to benefits under these plans. Further, despite the use of the word "may", these provisions create entitlement which may be enforced by employees, as these benefits are part of an employee's compensation package. The employer has no discretion to refuse benefits. The employer is not required to restore the grievor to active employment unless the grievor produces satisfactory medical evidence that she is capable of attending work on a regular basis. The grievor is entitled to exhaust those benefits to which she is entitled.

AUTHORITIES: Re Dominion Stores Limited and Retail, Wholesale & Department Store Union, Local 414 (1978), 20 L.A.C. (2d) 298 (Brown); Re De Havilland Aircraft of Canada Ltd. and United Automobile Workers, Local 122 (1982), 9 L.A.C. (3d) 271 (Rayner); Re Manalta Coal Ltd. and Alberta Strip Miners Union, Local 1595 (1984), 20 L.A.C. (3d) 58 (Sychuk); Re N.S.G.E.U. on behalf of David MacDonald and C.S.C. (Sept. 28, 1982) unreported (Outhouse); Re United Automobile Workers, Local 397, and Barber-Ellis of Canada Ltd. (1968), 19 L.A.C. 163 (Shchiff); Re Governing Council of the University of Toronto and Canadian Union of Public Employes, Local 1230 (1976), 13 L.A.C. (2d) 267 (O'Shea); Re Amalgamated Transit Union, Local 1572 and Corporation of the City of Mississauga Transit Department (August

27th, 1984) unreported, (Devlin).

DECISION: 87-97

Kent Homes Limited **AND** Labourers International Union of North America, Local 615

Eric G. DeMont, Arbitrator

Benny McCulloch, for the Union
Eric Johnson, for the Employer
(undated)

ISSUES: Seniority - Loss of Seniority 6:1200; Supervisors-Return to Unit - Seniority 6:1120.

CIRCUMSTANCES: The Union grieves that an employee who had previously accepted an office position, has now returned to the unit with his seniority intact. The Union argues that this employee has resigned by accepting the office position, that the office position was not a supervisory position, and therefore that the employee has no right to return to the unit with seniority. The Employer argues that the office position was a supervisory position, and therefore the employee is entitled to return to the unit with seniority intact, pursuant to the terms of the collective agreement.

AWARD: The grievance is upheld. The employee did not "resign", as he did not terminate his employment with the employer. However, the evidence did not establish that the office position was a "supervisory" position, and therefore that employee is not entitled to return to the unit with his seniority intact.

AUTHORITIES: Concise Oxford Dictionary.

DECISION: 87-98

Atlific (N.S.) Limited **AND** Hotel and Restaurant Employees Union, Local 662

Bruce Outhouse, Chair; Jerry Jollymore, Guy Williams

Raymond Larkin, Alex Neve, for the Union
Jim Connors, Peter Trask, for the Employer
September 18, 1987

ISSUES: Discipline and Discharge - Grounds for - Refusal to Obey Instructions 7:3610, 7:3612, Attitude 7:3660, Just Cause 7:1200; Disciplinary Penalties - Progressive Discipline 7:4422.

CIRCUMSTANCES: The Grievor claims that two suspensions, a 3-day suspension and a 5-day suspension, were imposed without just cause. The 3-day suspension was imposed as a penalty for alleged insubordination, and the 5-day suspension for a public display of temper, conduct unbecoming, etc.

AWARD: The grievance succeeds in part. While neither the Grievor nor her supervisor are considered to be entirely credible witnesses with regard to the first incident, the Board came to the conclusion that no direct order was in fact given, and that the supervisor overreacted. The 3-day suspension is revoked, and the grievor is to be compensated for lost wages and benefits.

With regard to the second incident, the testimony of other witnesses does not support the grievor's account of events. The Grievor is not a credible witness with regard to this incident. However, following the doctrine of progressive discipline, and the industry norm of a 3-day suspension for a first penalty, and considering that this is the first discipline for the grievor in over 16 years of employment, the 5-day suspension is reduced to a 3-day suspension. The Grievor is to be compensated for the two days with wages and benefits.

DECISION: 87-99

Sydney Co-operative Society Limited **AND** United Food and Commercial Workers Union, Local 1252

Robert M. Crosby, Arbitrator

Ronald Pink, for the Union
Bernard Boudreau, for the Employer
August 27, 1987

ISSUES: Discipline and Discharge - Grounds for-Untrustworthiness 7:3330, Just Cause 7:1200; Disciplinary Penalties - Nature of Disciplinary Sanction 7:4210.

CIRCUMSTANCES: The Grievor, head cashier at a store, wrote several cheques payable to her employer, using them to obtain what was in effect a cash advance. The Grievor was initially suspended with pay and then discharged. The Grievor claims that there was no just cause, and seeks reinstatement with compensation for lost pay and lost seniority. The Employer argues that the Grievor has breached the trust placed in her, and that there was just cause to discharge her.

AWARD: The grievance succeeds. The Board feels the Grievor's conduct does not warrant termination. The Grievor is ordered to be reinstated and, subject to a one month suspension, be compensated for lost wages and seniority.

DECISION: 87-100

Stan's Electric Limited (as represented by the Construction Management Bureau Limited) **AND** International Brotherhood of Electrical Workers, Local 1852

Charles O'Connell, Arbitrator

J. Bernard Boudreau, for the Union
Greig MacLeod, for the Employer
September 24, 1987

ISSUES: Interpretation - Ambiguity 3:4400; Union - Officials-Super Seniority 9:1510.

CIRCUMSTANCES: The Grievor claims that as shop steward he should not have been laid off so long as the Employer had men working on any job site. The Employer argues that the Grievor was the second last man at a job site at the time of lay off, and that it does not operate a "shop".

AWARD: The grievance succeeds. The arbitrator examined the meaning of "shop" and "shop steward", and looked at the conduct of the parties to clarify ambiguity. The meaning of "shop" should be that attributed to it by the parties over time, in the course of their dealings together. "Shop" is given the meaning as used in the trade, therefore a "shop steward" is a steward for more than one job site on which the Employer employs workers.

DECISION: 87-101

Seaview Manor Corporation **AND** Canadian Union of Public Employees, Local 2094

Bruce Outhouse, Arbitrator

Diane Bourque, for the Union
Reeves Matheson, for the Employer
September 21, 1987

ISSUES: Skill and Ability - Arbitral Review - Senior Employee With Required Ability 6:3210, Criteria of Ability and Qualifications - Bona Fides of 6:3300, Requirements of the Job 6:3100; Reasonableness - Skill and Ability 6:3100; Bias 1:5210, Job Posting 5:2520.

CIRCUMSTANCES: This grievance arises out of the re-posting of a job competition ordered by this Arbitrator in 1986. The Grievor claims that as senior applicant she should have been awarded the position of Activity Worker. The Employer maintains that the Grievor lacks the minimum qualifications for the position.

The Union argued 1) that the Grievor has the skills necessary to perform the job; 2) that the Employer acted in bad faith by manipulating the job qualifications so as to preclude the Grievor from qualifying; 3) that the job qualifications do not bear a reasonable relationship to the job; and 4) that the Employer did not in fact hold a fresh competition, but merely went through the motions of so doing. The Union points out that 3 of the 4 members of the selection panel were the members of the first selection panel whose decision was set aside.

The Employer argues that the job qualifications are bona fide, and that the Grievor lacks these attributes. It maintains that it acted fairly, and that the burden on the Union to show bad faith has not been discharged.

AWARD: The grievance is dismissed. The job qualifications are not unreasonable in relationship to the job, and the Grievor does not possess the requisite skills. The emphasis which the Employer may put upon the different aspects of the job, and skills, is not unreasonable. The Employer is entitled to take changing demands into account in establishing qualifications and in deciding what relative weight to assign to them. There is no evidence that the panel acted unfairly, indeed it awarded the position to a different applicant this time than last time. The Employer is not obligated from using the same selection panel. Unless the members had somehow demonstrated unsuitability for the task, it should not be presumed that they would act in a biased manner.

AUTHORITIES: Re Seaview Manor Corporation and Canadian Union of Public Employees, Local 2094 (1986), 27 L.A.C. (3d) 50 (Outhouse); Re Reynolds Aluminum Co. of Canada Ltd. and International Molders & Allied Workers Union, Local 28 (1974), 5 L.A.C. (2d) 251 (Schiff); Re O'Neil and Staff of Non-Public Funds, Canadian Forces Base Greenwood (1985), 19 L.A.C. (3d) 329 (Bendell); Re Children's Aid Society of Cape Breton and Canadian Union of Public Employees, Local 3010 (1987), 27 L.A.C. (3d) 289 (Outhouse).

DECISION: 87-102

Dartmouth District School Board **AND** Nova Scotia Union of Public Employees

Innis Christie, Chair; Eric Durnford, John D'Orsay

Ron Stockton, for the Union

Michael Moreash, for the Employer
September 16, 1987

ISSUES: Work Assignment - Bargaining Unit Work 5:1200.

CIRCUMSTANCES: During the Labour Day weekend in 1986, a supervisor employed by the Employer went each day to one of the schools and opened the building to let in a painting contractor and his workers. On the Sunday and Monday, the supervisor briefly inspected the work done the previous day. The Union claims that this breaches a provision of the collective agreement which states: "supervisors shall not do work properly belonging to the jurisdiction of the Union, except for training purposes or in the event of a strike". As neither of the exceptions apply, the Union argues that the work of opening the schools for the contractor was union work, and seeks call-out pay for the members who should have been called out to do the work. The Employer argues that opening the school doors is not work within the sense of the collective agreement, that many of its staff aside from custodial staff have keys, that opening the doors was a legitimate function of the supervisor, and that the maxim "De minimus non curat lex" (the law does not cure trifles) applies. The Union responds that because of the provision for call-out pay, De minimus does not operate.

AWARD: The grievance is dismissed. The majority reached its decision without applying the De minimus rule, which it stated to be inappropriate in view of the call-out pay provision. However, the majority felt that the work did not properly belong to the jurisdiction of the union. The majority stated: "Common sense must dictate the degree to which any job...can be segmented for the purpose of applying the provision...It simply cannot be the case that no supervisor can perform any physical function that constitutes part of work normally done by janitors and custodians." The majority examined the intention of the parties. Past practice was not helpful as it has changed several times. The Union has failed to discharge its onus.

DISSENT: (D'Orsay): The grievance should succeed. Where the parties have negotiated a restrictive clause on the duties which may be performed by supervisory staff, the Board should respect that clause.

AUTHORITIES: (Majority): Ontario Steel Products Co. Ltd. (1973), 3 L.A.C. (2d) 137 (Hinnegan); (Dissent): Orenda Ltd. (1982), 1 L.A.C. (2d) 72 (Lysyk); CALEA v. EPA (January 17, 1984) unreported (Christie); Air Canada (1975), 10 L.A.C. (2d) 113 (O'Shea); Faryna and Charny (1952), 2 D. L.R. 354 at 357; Ontario Hydro (1976), 12 L.A.C. (2d) 143 at 145-147; Irwin Toy (1982) 6 L.A.C. (3d) 328 at 333-335; Cara Operations, unreported, 80-71; Electric Reduction (1973), 3 L.A.C. (2d) 37; Sparton of Canada (1982), 6 L.A.C. (3d) 205; Gilbarco Canada Ltd. (1979), 22 L.A.C.

(2d) 16; Cooper Tool Group Ltd. (1981), 1 L.A.C. (3d) 193; Gainers Inc. (1982), 7 L.A.C. (3d) 193; Holophane Company (1978) 18 L.A.C. (2d) 79; Longyear Canada (1981) 2 L.A.C. (3d) 72; Re Cove Guest Home, unreported, 85-91; Boise Cascade Canada (1986), 23 L.A.C. (3d) 119; Reeves Modular Homes, unreported, 80-76.

DECISION: 87-103

Halifax-Dartmouth Industries Limited **AND** Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1, chartered by the Marine Workers Federation, C.L.C.

Peter E. Darby, Arbitrator

Gordon N. Forsyth, for the Union
Brian G. Johnston, for the Employer
September 30, 1987

ISSUES: Overtime - Right to Claim 5:3220, 4:2100, Management Rights 5:3210, 5:3220; Management Rights - Overtime 5:3210; Past Practice 3:4430

CIRCUMSTANCES: The Grievor alleges that the Employer violated provisions of the collective agreement when employees who had been under the Grievor's supervision were assigned to work overtime during a ship launch without the Grievor also being assigned overtime. The Union argues that as the Grievor was working on the job that day, supervising three employees who were assigned overtime, the collective agreement requires that the Grievor have preference to work overtime. The Union argues that past practice supports this interpretation of the clauses in question.

AWARD: The grievance is dismissed. The clause assigning preference does not have the meaning the Union argues for. The Employer's right to limit overtime and to determine which employees will work overtime is not limited in the manner the union argues. Past practice does not support the Union's argument. Also, the arbitrator finds that the grievor was not the supervisor of the three employees on the day in question.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, 2d ed., at 265-57.

DECISION: 87-104

Civil Service Commission **AND** Nova Scotia Government Employees Union

Bruce Outhouse, Arbitrator

Ronald Pink, for the Union
Jon Davies, for the Employer
September 23, 1987

ISSUES: Discipline and Discharge - Grounds for -- Refusal to Obey Instructions 7:3610, 7:3612; Disciplinary Penalties-Mitigating Factors - Employment Record 7:4428, Provocation 7:4412

CIRCUMSTANCES: The grievor was given a three day suspension following his alleged insubordination in refusing to obey certain instructions of his supervisor. These instructions included an order to cease a contentious debate in the workplace, an order to go into the supervisor's office to discuss the issue and the order, and the grievor's refusal to obey an order to go home for the rest of the day when initially told to do so. The grievor did go home after being told he would be removed by the police if he did not leave. The next day, the grievor again refused to participate in a discussion of the incidents. The Union argues that the grievor's employment record, and the employer's provocative behavior mitigate the grievor's conduct to the extent that the three day suspension is too severe a penalty.

AWARD: The grievance is dismissed. The Union admits that the conduct took place, the Arbitrator characterized the conduct as persistent insubordination sufficient to support a three day suspension. The contention of provocation was not accepted. The discipline in not out of proportion to the grievor's misconduct, taking into consideration his employment record.

AUTHORITIES: Re N.S.G.E.U. on behalf of Anna Steele and Civil Service Commission (June 29th, 1987), unreported, (Outhouse); Re Fanshawe College and Ontario Public Service Employees' Union (1976), 12 L.A.C. (2d) 189 (O'Shea); Re Nueller and United Automobile Workers, Local 456 (1974), 7 L.A.C. (2d) 282 (Hinnegan); Re Douglas Aircraft Co. of Canada Ltd. and United Automobile Workers (1972), 2 L.A.C. (2d) 56 (Weiler); Re Irving Pulp and Paper Ltd. and Canadian Paperworkers' Union, Local 30 (1976), 11 L.A.C. (2d) 113 (Rose); Re Newmont Mines Ltd. and Canadian Association of Industrial Mechanical and Allied Workers, Local 22 (1982), 3 L.A.C. (3d) 396 (Brown).

DECISION: 87-105

The Children's Aid Society of Halifax **AND** Canadian Union of Public Employees, Local 2837

W. Brent Cotter, Arbitrator

Jan Silliker, for the Employer

Susan Coen, for the Union
October 1, 1987

ISSUES: Vacancy 5:2510; Management Rights 5:0000; Job Posting 5:2520, Vacancy 5:2510; Job Classification and Descriptions- Creation or Revision 5:2000; Interpretation - Words and Phrases- Vacancy 5:2510.

CIRCUMSTANCES: This is a policy grievance brought by the union over the failure to post a half-time position which the union claims was created when a full-time employee switched to half-time, and a half-time employe switched to full-time. The changes in hours were made at the request of the employees involved. The union argues that the decreased hours of the former full-time employee created a half-time vacancy which should have been posted. The unit contains several half-time positions. The union argues 1) there was work to be done, therefore a vacancy existed; 2) the Employer has posted half-time positions in the past, and 3) the provisions of the collective agreement provide for seniority and for the opportunity of unit members to compete for positions. The Employer argues that 1) there was merely a "job switch", and that as both positions and incumbents, no vacancy existed, 2) it is within management rights to redeploy its workforce to maintain effectiveness, and 3) posting provisions do not apply to lateral moves within the unit.

AWARD: The grievance succeeds. The Employer is ordered to post the half-time position created by the reduction in hours of the full-time employee. The Employer could not have forced an employee to make such a "job switch"; it does not have the authority to unilaterally implement reciprocal changes. As there are half-time employees within the unit, it is clearly inappropriate not to post a half-time position.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, 2d ed., 1984 at p. 224-5; Re Tung-Sol of Canada Ltd. (1964), 15 L.A.C. 161 (Reville) at p. 162; Re Governors of Dalhousie College and University and Canadian Union of Public Employees, Local 1392, (Nov. 1979, MacLellan, unreported); Re International Nickel Co. of Canada and United Steelworkers, Local 6500, (1975) 8 L.A.C. (2d) 34 (Brandt); Re Ben's Limited and Bakery, Confectionery & Tobacco Workers International Union, Local 446, (May 29, 1980, Nunn, unreported); Re Corporation of the City of Victoria and Canadian Union of Public Employees, Local 50, (1982), 8 L.A.C. (3d) 368 (Brown); Re Atlas Steels Co. and United Steelworkers (1975), 8 L.A.C. (2d) 193 (Brown); Re Ascolectric Ltd. and International Electrical, Radio and Machine Workers, Local 553 (1980), 26 L.A.C. (2d) 390 (Weatherill).

DECISION: 87-106 *

Inverness Consolidated Memorial Hospital **AND** Canadian Brotherhood of Railway, Transport and General Workers Union, Local 607

R. Lorne MacDougall, Arbitrator

Thomas Barron, for the Union
Robert Cook, for the Employer
October 8, 1987

ISSUES: Temporary, Casual and Part-Time Employees 5:1124; Skill and Ability - Arbitral Review - Senior Employee With Required Ability 6:3210; Promotion, Demotion and Transfer - Seniority 6:2100.

*This is an award in a grievance (86-41) which has been remitted back to the arbitrator following appeals of the award to the Nova Scotia Supreme Court Trial Division and the Nova Scotia Supreme Court Appeal Division. The Appeal Division ruled that the Arbitrator has erred in not finding that the Grievor was temporary employee. The arbitrator is now to reconsider the grievance in light of the Grievor's status as a temporary employee. Note that the awards of the Trial Division and of the Supreme Court are appended to the award. They have not been summarized.

CIRCUMSTANCES: The grievance alleges that the Employer violated the collective agreement by filling a job vacancy with an employee of lesser seniority than the Grievor. The Grievor is a temporary employee; the incumbent was a casual employee with a long-term employment relationship with the Employer.

AWARD: The grievance fails. The collective agreement specifically states that temporary employees will not accumulate seniority. Although temporary employees will be given preference in job competitions over persons "from outside the hospital with no employment relationship" providing skills are equal, this does not assist the Grievor. The incumbent has a long-term employment relationship with the Employer as a casual employee. Further, the Arbitrator finds that at the time of awarding the position, the skills of the grievor were not as great as those of the incumbent.

DECISION: 87-107

Grand Hotel Company Limited **AND** Hotel and Restaurant Employees & Bartenders International Union, Local 662

Peter E. Darby, Arbitrator

M. Henry Martell, for the Union
Williams B. Goss, for the Employer

October 6, 1987

ISSUES: Management Rights - Schedules 5:3100; Working Hours and Shifts - Reduction of Hours 6:2210

CIRCUMSTANCES: During a two week period, the employer reduced the hours of all of its regular waitresses in order to train waitresses for the summer season. The Union argues this violated the collective agreement provisions on work scheduling, and shift preferences.

AWARD: The grievance is dismissed. The collective agreement does not guarantee a minimum number of hours of work to any employee. Seniority rights were not infringed as all regular waitresses had their hours reduced equally. The employer's right to schedule its workforce is not restricted in the manner the union argues for.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, 2d 4ed., 1984, at p. 279.

DECISION 87-108

Cape Breton District School Board AND Canadian Union of Public Employees, Local 781.

Judge Robert F. Ferguson, Arbitrator

Brian Sheehan, for the Union
Charles Broderick, for the Employer
September 11, 987

ISSUES: Skill and Ability - Arbitral Review 6:3100, Senior Employee With Required Ability 6:3210.

CIRCUMSTANCES: The grievor applied for a position which was awarded to an applicant from outside the unit. The grievor claims that as an employee with seniority and the skills required, he should have been awarded the position. The Union argues that the employer violated the collective agreement by proceeding in a manner designed to hire the "best person", ignoring seniority, that the employer changed the qualifications for the position; and that the employer considered irrelevant factors in making its decision. The employer responds that as none of the employee candidates were qualified, it was entitled to hire from outside its current workforce, that the qualifications for the job are bona fide and reasonable, and that irrelevant factors were not considered.

AWARD: The grievance is dismissed. The arbitrator reviewed the employer's procedure, and found no discrimination or bad faith. The qualifications are not unreasonable in relation to the job, and the grievor did not have those qualifications.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, 2d ed, 1984 at 295 and 302.

DECISION 87-109

City of Sydney **AND** Canadian Union of Public Employees, Local 759

Judge Robert F. Ferguson, Arbitrator

Duncan MacLean, for the Union
Michael Whalley, for the Employer
September 15, 1987

ISSUES: Temporary, Casual or Part-Time Employees 5:1124; Past Practice 3:4430; Interpretation - Words and Phrases - Day or Work Day 4:2100.

CIRCUMSTANCES: The issue of this arbitration involved a determination of whether or not the grievor was a temporary or a permanent employee. It was raised as a preliminary objection to the arbitration, as temporary employees do not have the right to bring a arbitration. The award disposes of this preliminary objection. The grievor had worked 6 out of 7 summers for the Employer. In 1986 he began work on June 9 and was laid off without notice on August 22. Under the terms of the collective agreement, a permanent employee is one who has worked 60 days in the year for the employer. The grievor argues that he is a permanent employee because 1) he worked 60 days, as he could have been called out to work on Saturday or Sunday given the work he was doing, and 2) unlike previous years, the grievor was not given any notice. Had such notice been given, the grievor would have actually worked over 60 days.

AWARD: The grievance succeeds. The first argument is rejected as past practice is accepted to show that days actually worked are the days required to become a permanent employee. Regulation 5 under the Labour Standards Code excludes employees under a collective agreement from s.68 of the Labour Standards Code. The collective agreement, while extending only limited rights to temporary employees, does cover temporary employees. Past practice had been to give the grievor notice; he was therefore entitled to notice, which would give him 60 days actually worked. The grievor is therefore a permanent employee, with seniority to be calculated from August 1986.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, 2d ed., at p. 158; Labour Standards Code S.N.S. 1972, c.10, and regulations.

DECISION 87-110

Glen Haven Manor Corporation **AND** Canadian Union of Public Employees, Local 2330.

J. A. MacLellan, Chair; Ken Hennick, Douglas Eddy

Susan Coen, for the Union
Peter McLellan, for the Employer
October 16, 1987

ISSUES: Skill and Ability - Arbitral Review - Senior Employee With Required Ability 6:3210; Criteria of Ability and Qualifications 6:3300.

CIRCUMSTANCES: The Union brings this grievance on behalf of two employees who applied for a position which was awarded to a candidate from outside the unit. The Union argued both candidates have the required ability. The employer argued that neither of the employees has the required qualifications.

AWARD: The grievance is dismissed. The qualifications set by the employer are reasonable and bona fide. "Ability" as used in the collective agreement refers to possession of the required qualifications, which neither of the employees in fact possessed.

AUTHORITIES: Re Dominion Stores Limited and Retail, Commercial & Industrial Union, Local 206 (1983), 9 L.A.C. (3rd) 54.

DECISION 87-111

Farmers Co-operative Dairy Limited **AND** Teamsters, Chauffeurs, Warehousemen and Helpers, Local 927.

Ronald J. Downie, Arbitrator

Susan Coen, for the Union
D. H. McDougall, John Rogers, for the Employer
(undated)

ISSUES: Overtime 5:3200, Distribution of Overtime - Persons Normally Performing 5:3222, Right to Claim 5:3220; Management Rights - Overtime 5:3210, Schedules 5:3100.

CIRCUMSTANCES: A regularly scheduled employee missed two shifts for medical reasons. The grievor as senior employee claims that these shifts should have been assigned to him as overtime. The Employer responds that the overtime provisions of the agreement do not apply in this case because these shifts were not overtime, although the employees who worked them were paid at overtime rates.

AWARD: The grievance is dismissed. The arbitrator found that overtime is work which must be added to the regular shift of an employee, not necessarily any and all "extra work", whatever that may arise from. The provisions of the collective agreement are not applicable as these shifts were not overtime.

AUTHORITIES: Re Journeymen Stone Cutters Ass'n, Toronto Local 1, and Ritchie Cut Stone Co. Ltd., 17 L.A.C. 202; Decision of Arbitrator Leo McIntyre, July 28, 1987, Cape Breton Dev. Corp.; Brown & Beatty, Canadian Labour Arbitration, 2d ed., s. 5:3200 Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al., 124 D.L.R. (3d) 684; Decision of Arbitrator Lorne O. Clarke, January 15, 1981, Dartmouth Firefighters Association and City of Dartmouth; Decision of Arbitrator Brian Langille (hearing August 26, 1981) Twin Cities Cooperative Dairy Limited and Teamsters Union; Re Ottawa Citizen and Ottawa Newspaper Guild, Local 205, 17 L.A.C. (2d) 342; Re Gulf Canada Products and Energy & Chemical Workers Union 6 L.A.C. (3d) 189.

DECISION: 87-112

Boyd and Garland Construction Limited **AND** United Brotherhood of Carpenters and Joiners, Local 83.

Eric G. DeMont, Arbitrator

Hugh Simpson, for the Employer
Elwin MacNeil, for the Union
(Undated)

ISSUES: Labour Relations Act - Jurisdictional Disputes 2:3110; Jurisdiction - Sources - Statutes 2:1100, 2:1200.

CIRCUMSTANCES: The Union claims the Employer breached the collective agreement by subcontracting work properly belonging to the union to another union. The work has been completed. As a preliminary issue, the Employer raised the issue of whether the arbitrator can hear the matter on the grounds that it involves a jurisdictional dispute between two unions. The employer suggests that the proper forum is the Construction Industry Panel. The union responds that there is no jurisdictional dispute, and even if there were, it could still proceed by way of grievance arbitration. The arbitrator heard argument on these points only, and did not consider the substance of the complaint against the

Employer.

AWARD: The objection fails. While the arbitrator finds that there is a jurisdictional dispute involved, he finds that the only parties to be affected by any award which may be made are the Union and the Employer as the work which is the subject of the complaint has been completed. The Trade Union Act does not rule out proceeding by way of arbitration, although the union will be called upon to explain why it failed to follow a procedure set out in the collective agreement, and why it delayed in filing the grievance.

AUTHORITIES: Trade Union Act, s. 50; Re PCL Construction Ltd. and Cascade 8 L.A.C. (3d) 49; Machinists, Fitters, and Helpers and Victoria 60 CLLC No. 15283 (B.C. Court of Appeal); United Brotherhood of Carpenters and Joiners and Marwell 66 CLLC No. 14115 (B.C. Supreme Court); Brown and Beatty, Canadian Labour Arbitration, 2d ed., at p.89.

DECISION 87-113

Board of Governors University College of Cape Breton AND Nova Scotia Government Employees Union, Local 18, Teachers' Bargaining Unit

Charles O'Connell, Chair; Frank L Elman, Cam Nelson

Mr. Ronald A. Pink, for the Union
Mr. J. Bernard Boudreau, for the Employer
October 27, 1987

ISSUES: Leave of Absence - Union Business 7:3120, 9:1400 Management Rights - Fairness 4:2300; Evidence - Weighing the Evidence 3:5100.

CIRCUMSTANCES: The grievor received three consecutive two-year leaves of absence. The letter granting the last of these leaves stated that this was the last extension. Upon application for an additional two-year leave, there was some negotiation between the Employer and the Grievor. The grievor did not accept the final offer made by the Employer. The grievor claims that the employer has violated the collective agreement by refusing to grant him this two-year leave. The Grievor seek a declaration that the Employer has violated the collective agreement, an order to grant him the requested leave, an order for the Employer to cease its discriminatory practices, and damages as a remedy.

AWARD: The grievance is dismissed. The provisions of the collective agreement which the grievor alleges were breached were reviewed and found not to have been violated. The actions of the Employer were not unreasonable, unfair, arbitrary, discriminatory, etc. Granting a leave of absence is at management's discretion; as long as this discretion is not discriminatory, unfair, or inconsistent. The Grievor failed to prove the allegations of discrimination, etc. The grievor's own notes of a meeting cannot be used to corroborate the grievor's testimony. There was insufficient substantiation, given the degree of variance of testimony.

AUTHORITIES: Re Kysor of Ridgetown (1967) 18 L.A.C. 383 at 389 (Weiler)

DECISION: 87-114

Ron May Pontiac GMC Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers Local 506

Charles O'Connell, Arbitrator

Mr. Victor Tomiczek, for the union
Mr. J. Michael Kuna, for the Employer
October 26, 1987

ISSUES: Layoff - Disability 7:3200, 7:3240, Loss of Insurance 7:7510.

CIRCUMSTANCES: The grievor lost his driver's license for two years. The Employer laid the grievor off in accordance with a policy implemented after a similar incident resulted in an illegal work stoppage. It is necessary to the Employer's business that, for insurance purposes, the grievor have a valid license. The grievor seeks to be reinstated with no loss of benefits.

AWARD: The grievance is dismissed. The employees were aware of the policy. The grievor has failed to prove, on the balance of probabilities that management exercised its rights in a discriminatory, arbitrary or inconsistent manner.

AUTHORITIES: Re Kysor of Ridgetown (1967), 18 L.A.C. 383 at 389.

DECISION 87-115

Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of Halifax, now known as Metropolitan Authority, Transit Division - AND - Amalgamated Transit Union Local 508

Peter E. Darby. Chair; Eric Durnford; Ronald Stockton

Arthur F. Beaver, Charles D. Clancy, for the Union
Terry L. Roane, for the Employer
October 26, 1987

ISSUES: Discipline and Discharge - Grounds for - Refusal to Obey Instructions 7:3610, 7:3612, Reasonable Personal Excuse 7:3626

CIRCUMSTANCES: The grievor received a two and a half day suspension for insubordinate conduct which occurred during the administrative investigation of a passenger complaint against him. An order to 'come into' the office was repeated several times but the grievor refused, even after being warned of possible disciplinary action. The grievor claims that he had been told by a union official not to speak to management representatives. The grievor seeks to have the discipline removed or lessened.

AWARD: The grievance is dismissed. The conduct of the grievor is found to constitute a "serious flagrant" case of insubordination. The majority of the Board declines to interfere with the penalty set by management in this case. Insubordination is seen as a very serious challenge to the employer-employee relationship.

DISSENT: (Stockton): (No written dissent)

AUTHORITIES: Brown and Beatty, Arbitration, 2d ed. (1984) at pp. 437-439ff and 449-452: Re Canex Placer Ltd. and Allied Workers, Local 17 (1979), 21 L.A.C. (2d) 127 (Weiler): Trade Union Act, SN.S 1972, c.19, s.41 (1) (d)

DECISION 87 - 116

Rahay's Supermarket of North Sydney AND Retail Wholesale and Department Store Union Local 596

David J. MacDonald, Arbitrator

John B. Campbell, for the Union
Bernard Leviten, for the Employer
October, 1987

ISSUES: Wages - Alteration of Wages 8:1400; Estoppel 2:2200, 2:2210; 2:2220.

CIRCUMSTANCES: For business reasons relating to a financial crisis, the two grievors were assigned new duties and their wages reduced. The employer claims that the union had agreed to these changes, understanding that they were crucial to the survival of the business. The union says that it did not agree.

AWARD: The grievances succeed in part. Even if the union had agreed, the filing of these grievances would put the employer on notice that this agreement had been rescinded. Estoppel would apply only to the period between the alleged agreement and the filing of the grievances. The collective agreement provides for temporary re-assignment, with classification changes after three months. The grievors are awarded the wage differential between their old rate and the new rate for a three month period, pursuant to a provision of the collective agreement which provides for an arbitrator to make an award of compensation "as may be deemed fair". The award is made in light of the employer's difficult business situation.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2d ed.) p. 82; Hallwork Containers Ltd. (1983), 8 L.A.C. (3d) 117
(Barkett); Canada Sand Papers Ltd. (1981), 2 L.A.C. (3d) 85
(Arthurs)

DECISION 87 - 117

Lynk Electric Limited AND International Brotherhood of Electrical Workers Local 1852

Frank L. Elman, Arbitrator

Bernard Boudreau, for the Union
Greig MacLeod, for the Employer and the Construction Management Bureau
October 26, 1987

ISSUES: Management Rights 5:0000; Work Assignment 5:1000

CIRCUMSTANCES: The first grievance alleges gender discrimination against an apprentice claiming she was laid off because of her sex and because of an allegation that she could not perform her job properly. This grievance was withdrawn when the employer agreed to write a letter stating the grievor was a competent and qualified employee.

The second grievance alleges that the employer violated the collective agreement by failing to maintain the journeymen-apprentice ratio at a job site. The employer argues that there were two separate contracts at the same location, and since two jobs existed, there was no breach of the collective agreement.

AWARD: The grievance is dismissed. The arbitrator finds that there were two separate jobs taking place at the same location. These jobs were tendered for separately, and were billed separately. The jobs were unrelated to one another, and were not components of a larger project.

AUTHORITIES: United Brotherhood of Carpenters and Joiners of America Local 1588 v. Joneljim Concrete Construction Limited

DECISION 87-118

Carey Bros. Masonry Ltd. AND Labourers' International Union of North America Local 615

Eric G. DeMont, Arbitrator

Gordon Forsythe, for the Union
Bill Carey, for the Employer
November 5, 1987

ISSUE: Discipline and Discharge - Grounds for - 7:3000, Fighting or Threatening 7:3430; Disciplinary Penalties - Mitigating Factors - Apology 7:4422, Employment Record 7:4428, Provocation 7:4412, Employees State of Mind - Fighting 7:3430.

CIRCUMSTANCES: The grievor was discharged following an incident in which he struck his supervisor. The union argues that the discharge is too severe a penalty given the mitigating factors of apology, provocation and employment record. The employer argues that this incident constituted a serious challenge to management's authority, and that discharge was justified.

AWARD: The grievance is dismissed. Even considering the claims for mitigating factors, dismissal is an appropriate remedy in this sort of incident, and follows precedent.

AUTHORITIES: Seaspan and Marine Maintenance, 18 L.A.C. 220 at 225; Re: Scarborough and C.U.P.E., 6 L.A.C (3d) 214; adopting Dominion Glass and United Glass and Ceramic Workers (Linden); Re: Scarborough General Hospital 6 L.A.C. (3d) 214; Re: Rolland 12 L.A.C. (3d) 391; Re: Government of B.C. and Professional Employees 14 L.A.C. (3d) 280; Re: Canadian Carborundum and United Steel Workers 5 L.A.C. (2d) 29; Re: Home Hardware 20 L.A.C. (3d) 76; Re: General Bakeries 21 L.A.C. (3d) 155; Brown and Beatty, Canadian Labour Arbitration, 2d ed. at pp. 405-407; International Wood Workers and Comox Logging, 1964 15 L.A.C. 182; United Glass and Ceramic Workers (1970), 12 L.A.C. 78 American Can Co. (1977), 17 L.A.C. (2d) 24; Spruce Falls Power and Paper (1978) (2d) 343

DECISION 87-119

Brookfield Foods Limited, a division of Scotsburn Cooperative' Services Limited AND The Canadian Brotherhood of Railway, Transport and General Workers, Local 503

Peter E. Darby, Arbitrator

E.A. "Ted" Powell, for the Union
James C. Leefe, for the Employer
November 6, 1987

ISSUES: Resignation 7:7100

CIRCUMSTANCES: The grievor submitted his resignation, allegedly while suffering from anger, frustration and stress. He sought to revoke the resignation a few days later, but the employer refused to allow this. The grievor claims the refusal constitutes a breach of the collective agreement.

AWARD: The grievance is dismissed. There were at least two occasions when the grievor could have revoked his resignation before the meeting with management when it was accepted. The grievor only sought to revoke the resignation after this meeting; he did not attempt to revoke it at the meeting. The employer was justified in accepting the resignation as final.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, 2nd ed., 1984 at 513 ff; Re: Sun Oil Employees' Assoc. and Sun Oil Co. Ltd. (1968), 19 L.A.C. 365 (Weiler); Re: Metropolitan Toronto Board of Commissioners of Police and Metopolitan Toronto Police Assoc. (1978), 18 L.A.C. (2d) 7 (Adams); Re: Coca-Cola Lts. and United Brewery Workers

DECISION 87-120

Co-op Atlantic - Sydney Fuels AND United Food and Commercial Workers International Union Local 1252

Charles O'Connell, Arbitrator

Ronald A. Pink, for the Union
George Khatter, Theresa Forgeron, for the Employer
November 10, 1987

ISSUES: Discipline and Discharge - Grounds for - Work Performance - Incompetence 7:3510

CIRCUMSTANCES: The grievor, who had been a mechanic for twenty-one years, received notice that he would be discharged if his performance did not improve. He was subsequently discharged. The grievor seeks reinstatement with back wages. The employer argues that the grievor failed to meet production standards, failed to update his skills, lacked communication skills, had a poor attitude to customers, and was incompetent.

AWARD: The grievance succeeds. The grievor is to be reinstated with back wages. There is no job description for his position which sets production standards; nor is it the function of the grievor to solicit business for the employer. The grievor has received no mandatory direction to update his skills and it would, as a practical matter, be difficult for him to arrange to do so. There is no evidence of the grievor's poor attitude to customers, nor of any incompetence as a mechanic. The grievor is to conform to the new system introduced by management, provided he is trained to do those jobs. In any area in which he is not trained, the employer should make a concerted effort to introduce him to an adequate training program.

AUTHORITIES: Marine Harbours Board and International Longshoremen's and Warehousemen's Union Local 516 (September 30, 1982, unreported), Hope.

DECISION 87-121

Maritime Telegraph & Telephone Company Ltd. AND The Atlantic Communication & Technical Workers' Union

W.Brent Cotter, Arbitrator

Raymond F. Larkin, for the Union
Gregory I. North, for the Employer
November 9, 1987

ISSUES: Discipline & Discharge - Grounds for - Carelessness 7:3520, Alteration of Grounds 7:2200; Disciplinary Penalties-Specific Penalty 7:4106

CIRCUMSTANCES: The grievor was suspended for two days following the second preventable accident within one year while in charge of one of the Employer's vehicles. Subsequent to this second incident, an appeal found that the first preventable accident was not one for which he was responsible, nor was it one he could have avoided. The incident giving rise to the suspension was not, therefore, a second preventable accident. The grievor was disciplined according to the Employer's disciplinary guidelines. The penalty for a first preventable accident is a written warning. The Union argues that a warning is the appropriate penalty in this case. The Employer argues that the grievor's misconduct constitutes gross negligence, warranting a penalty of up to three days' suspension. The Union argues that the grievor's conduct was not negligent.

AWARD: The grievance is allowed. The suspension is to be replaced with a written warning in accordance with the Employer's own guidelines. The grievor's conduct was careless, but not grossly negligent within the meaning of the term as used in tort law. The Employer may not rely on general discretion to impose a suspension for a first preventable accident in view of its own guidelines.

AUTHORITIES: Re: Corporation of the City of Brampton and Amalgamated Transit Union, Local 1573 (1979), 19 L.A.C. (2d) 237 (Shime); Re: Slater Steel Industries Ltd., Burlington Steel Division and United Steelworkers, Local 4752 (1975), 8 L.A.C. (2d) 135 (Shime); Re: United Mine Workers, District 50, Local 15036, and Miracle Products Co. Ltd. (1964), 15 L.A.C. 128 (Lane); Brown & Beatty, Canadian Labour Arbitration (2d ed, 1984) at p. 339 and 342; Re: U.S.W. and Aerocide Dispensers Ltd. (1985), 15 L.A.C. 416 (Laskin); Re: Loblaw Groceterias Co. Ltd. and Union of Canadian Retail Employees C.L.C. (1973), 3 L.A.C. (2d) 325 (Adams); Re: City of Calgary and Amalgamated Transit Union (1981), 4 L.A.C. (2d) 50 (Beattie); Re: Abbie J. Lane Memorial Hospital and Nova Scotia Nurses' Union (1981), 2 L.A.C. (2d) 126 (Christie); Re: City of Toronto and Canadian Union of Public Employees Local 43 (1975), 7 L.A.C. (2d) 160 (Adams); Re: Hiram Walker and Sons Ltd. and Distillery Workers, Local 61 (1974), 4 L.A.C. (2d) 291 (Adams); McCulloch v. Murray (1942) S.C.R. 141; Goulais v. Restoule, (1975) 1 S.C.R. 365; Lang v. Pollard, (1957) 9 D.L.R. (2d) 337 (N.B.S.C., App. Div.), aff'd (1958) 11 D.L.R. (2d) 161 (S.C.C.); Gunvaldsen v. Seward (1969), 60 W.W.R. 366, aff'd (1971) 4 W.W.R. 636 (S.C.C.); Ewashko v. Desiatnyk (1973), 35 D.L.R. (3d) 318 (Man. C.A.); Rudy v. Peterson (1965), 55 D.L.R. (2d) 447 (Man. Q.B.); Eid v. Dumas (1968), 5 D.L.R. (3d) 561 (N.B.S.C., App. Div.).

DECISION 87-122

Pictou District School Board AND C.U.P.E. Local 867

Milton J. Veinot, Chair; John Plowman, Michael Tynes

Blaise MacDonald, Susan Coen, for the Union
Bruce T. MacIntosh, for the Employer
October 27, 1987

ISSUES: Discipline and Discharge - Grounds for - Insolent Behavior or Obscene Language, 7:3660, Just Cause, 7:1200; Procedure Powers of Board of Arbitration - Costs, 2:1430, Delay, 2:3210, Production of Documents, 3:1420; Good Faith- Discriminatory Displine, 7:4414; Evidence - Documents- Production Prior to Hearing 3:1420.

CIRCUMSTANCES: The grievor, a school bus driver, was discharged for allowing and encouraging obscene and unruly behavior on his bus. The union claimed that the employer deliberately failed to disclose documents , causing unnecessary delays, that it violated the no discrimination article of the collective agreement, and that there was no just cause for discharge.

AWARD: The grievance is dismissed. The misconduct of the grievor was serious enough "to interfere with and to prejudice the safe and proper conduct of the business of the company." However, solicitor - client costs are awarded in favour of the union, following unnecessary delays in the production of documents by the employer. The arbitrator finds jurisdiction to award costs by treating s3(1) of the Arbitration Act as part of the collective agreement, relying on s.41 (1) (e) of the Trade Union Act.

DISSENT (Plowman): The grievance fails. However, costs should not be awarded against the employer for two reasons: first, the acts relied upon by the Chairman do not , in fact, grant jurisdiction to the Board; second, there was no deliberate misconduct by the employer which warrants solicitor - client costs.

DISSENT (Tynes): The grievance is allowed. the grievor is to be reinstated because of (a) the employer's failure to disclose documents, (b) the employer's attempts to "get even" with the grievor, resulting in a violation of the Collective Agreement, (c) the fact that the grievor had no discipline on his record made the discharge unjust.

AUTHORITIES: Trade Union Act (Nova Scotia) s.41(1) (a) (d) (e); Arbitration Act, R.S.N.S. 1967, c.12, ss 1(d), 3(1); Brown and Beatty, Canadian Labour Arbitration (2d); Re Hope and Co-Operators Insurance Association et. al. (1986), 53 or 208 (Ont. Div. ct.); I.A.S. Computer Corp Ltd. v. Mandala Systems et. al. (1980) 40 N.S.R. 541 (T.D.); Church of Scientology of Toronto v. Maritime Broadcasting Ltd. et.al. (1979) 39 N.S.R (d) 500; Husbands of Marchwood Ltd. v. Drummond Walker Developments Ltd. [1975] 2 All E.R. 30 (C.A.); Re Dartmouth District School Bosrd and Nova Scotia Union of Public Employees, Unit no. 2 (19830 12 L.A.C. (3d); City of Sydney v Canadian union of Public Employees, Local 933 (1985) 67 NSR (2d) 62 (NSCA); Black's Law Dictionary (5 ed); Krever et.al. (1986), 66 DLR (2d) 597; R.C.A. Victor Ltd v I.W.A. (1971) 19 DLR (3d) 369; Christie, Innes; "The Nova Scotia Trade Union Act, 1972", (1973), Dal. L.J.182; Re Shoppers Meat Market (1984) 16 LAC (3d) 184; Re Oil, chemical and Atomic Workers and Polymer Corp. Ltd. (1959) 10 LAC 51; The Erich Schroeder [1974], lloyd's Rep.192; P.A. Wournell Construction v. Allen (1980) 108 DLR (3d) 723 (CA); Re Tenvolde Construction Ltd (1981) NSR (2d) 587; Gorsky, M>R., Canadian Labour Arbitration.

DECISION 87-123

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union

Bruce Outhouse, Arbitrator

Kimberly Turner, for the Union
William Wilson, for the Employer
November 9, 1987

ISSUES: Safety - Equipment and Clothing 8:4100; Company Rules 4:1500, Safety Equipment 8:4100

CIRCUMSTANCES: This is a policy grievance over an Employer policy which the Union claims violates similar provisions in two collective agreements. In these provisions, the Employers agree to provide safety equipment. The policy sets a limit on the amount which an employee may claim in respect of reimbursement for safety boots. The employer set a limit of $60.00 per year for safety boots which met its standard requirements (C.S.A.-approved, etc.) after conducting a price survey. The employer argues that this is a reasonable policy. The Union introduced evidence that some boots cost in excess of $60.00. Further, the union argues that the policy does not provide for a situation on where an employee may require more than one pair of boots in a year. The Union seeks a declaration that the policy should not set any maximum limit, and that it should be more flexible, if indeed the setting of a policy is found to be reasonable.

AWARD: The grievance succeeds with respect to one minor point only. In general the policy is reasonable, but the Arbitrator orders that it be amended to allow for managerial discretion in exceptional circumstances. The policy is to be considered as a guideline, and not as an absolute rule. The arbitrator also suggests that the Employer might incorporate its standards for the safety boots into the policy.

AUTHORITIES: Re: Lumber & Sawmill Workers' Union, Local 2537, and KVP C. Ltd. (1965), 16 L.A.C. 73 (Robinson); Re: Island Telephone Co. Ltd. and International Brotherhood of Electrical Workers', Local 1030 (1984), 17 L.A.C. (3d) 47 (Christie); Re: McKellar General Hospital and Ontario Nurses' Association (1984), 15 L.A.C. (3d) (Beatty); Re: City of Calgary and Calgary Police Association (1982), 6 L.A.C. (3d) 285 (Owen).

DECISION 87-124

Nova Scotia Power Corporation AND International Brotherhood of Electrical Workers' Local 1928

W.Brent Cotter, Arbitrator

Raymond F. Larkin, for the Union
Ms. Terry L. Roane, for the Employer
November 17, 1987

ISSUES: Overtime - Distribution of Overtime 5:3220, - Equitable

Distribution 5:3224; Interpretation - Ambiguity 2:2220, 3:4400; Past Practice 3:4430

CIRCUMSTANCES: The grievors claim to be entitled to a greater share of overtime work than is presently made available to them by them by the Employer. The union seeks declaration that the Employer's overtime rotation system be amended to allow the grievors a fairer share of overtime for their classification. The Employer argues that its overtime system is within its management rights in the area of direction and operation of the workplace. Overtime assignments are made on the basis of specific work groups, and not simply along classification lines. The relevant provision of the collective agreement provides for overtime to be distributed "as evenly as practical amongst qualified employees".

AWARD: The grievance is dismissed. The clause of the agreement is ambiguous, and does not address the question of the pool of qualified employees to whom overtime opportunities are to be offered on a rotational basis. It is therefore legitimate to consider past practice. In this case, past practice favors the employer's system, which has been in place for many years, and to which the Union has not previously objected.

AUTHORITIES: Re: Labatts Ontario Breweries Ltd. (1973), 2 L.A.C. (2d) 119 (Shime); Re: Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43 (1984), 13 L.A.C. (3d) 58 (Teplitsky); Re: John Bertram and Sons Co. Ltd. (1967), 18 L.A.C. 362 (Weiler).

DECISION 87-125

Yarmouth Regional Hospital AND Nova Scotia Nurses' Union

J.A. MacLellan, Chair; Raymond Larkin, Donald McDougall

Peter McLellan, for the Employer
John Merrick, for the Union
November 23, 1987

ISSUES: Discipline and Discharge - Carelessness 7:3520; Disciplinary Penalties - Arbitral Review - Scope 7:4100; Professional Employees - Standard of Conduct 7:3520, 7:4400 fn 890

CIRCUMSTANCES: The grievor was discharged from her position as a nurse following an incident where she failed to provide appropriate care to a critically ill patient. The grievor seeks reinstatement without loss of seniority or pay. The grievor admits that she should have handled the situation differently, and that some form of discipline is warranted.

AWARD: The grievance is upheld. The Board recognizes that the situation causing the patient to be critically ill was unusual, but this does not excuse the grievor's failure to provide appropriate care. The grievor is to receive a one-month suspension to begin when her current maternity leave expires. She is to be reinstated, preferably to another area of the hospital, and to be placed on probation for a period of eight months. During this time she may be terminated if her supervisors are satisfied that she took an inappropriate action, including unsafe or unprofessional nursing practices. The termination must be based on just cause. The grievor will have access to the grievance-arbitration procedure to determine just cause; if just cause is upheld, the appropriateness of termination as a penalty is not to be challenged.

DISSENT: (McDougall). The dissent does not lie on any point of law, but rather on the view that the discretionary decision of management in this case should not be interfered with. The exercise of this discretion was reasonable in view of the seriousness of the incident and on the grievor's past employment record.

ADDENDUM (UNANIMOUS): The Board comments on the attitude of one of the physicians who appeared before it. Persons appearing before the Board in arbitrations between the union and the hospital are urged to communicate openly and candidly with the arbitrator(s).

AUTHORITIES: Government of B.C. and B.C. Government Employees Union (1980), 26 L.A.C. (2d) 71; Baptist Housing Society (1982).

DECISION 87-126

Chisholm Developments AND International Union of Operating Engineers, Local 721

N.M. Scaravelli, Arbitrator

Gordon Forsyth, for the Union
Daniel MacIsaac, for the Employer
November 25, 1987

ISSUES: Wages 8:1000

CIRCUMSTANCES: This grievance arose over the rates of pay for the three grievors at a job site in Antigonish. At the time of the hearing, the parties reported a settlement, which they requested be embodied in an order.

AWARD: The grievance is upheld. The Employer is ordered to pay specific amounts to each of the three grievors, less statutory deductions, within two weeks of the date of the award.
DECISION 87-127

Metropolitan Authority AND Civil Workers Union, Local 108

R.Lorne MacDougall, Arbitrator

Bruce Evans, for the Union
A.William Cox, for the Employer
November 25, 1987

ISSUES: Innocent Absenteeism 7:3210; Illness or Disability-Employer Response - Alternative to Termination - Absenteeism 7:3200, 7:3210, 7:3240, Discipline - Inability to Work Properly 7:3220, 7:3510, Medical Examinations 7:3230, 7:3250; Remedies-Types pf Remedy - Damages - Interest 2:1414, Mitigation 2:1412.

CIRCUMSTANCES: The grievor was laid off due to his high absentee rate. He had a recurring back problem as well as other medical and injury-related problems. The employer argues that the grievor is unfit to do the work assigned to him due to physical condition. The Union argues that the Employer's position is unreasonable.

AWARD: The grievance is upheld. The grievor is to be reinstated as a heavy equipment operator. However, the legitimate concern of the Employer is recognized. The grievor's reinstatement is subject to his maintaining a record of absences attributable to his back problem no higher than the average absentee rate at the work site for six months. If his absences attributable to his back problem are greater than the average, he may be laid off or dismissed. During this time, it will be the grievor's responsibility to establish by means of medical certificates or reports the reasons for his absences.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (2d ed., 1984) at p. 298, 377-8, and 371; Re: Borough of Scarborough Professional Fire Fighters' Association Local 626 I.A.F.F. (1977), 15 L.A.C. (2d) 71.

DECISION 87-127a

Metropolitan Authority AND Civil Workers Union, Local 108

R.Lorne MacDougall, Arbitrator

Bruce W. Evans, for the Union
A. William Cox, for the Employer
February 10, 1988

ISSUES: Functus Officio 1:5600.

CIRCUMSTANCES: The union states that the arbitrator did not retain jurisdiction with respect to the reinstatement of the Grievor in his job as a heavy equipment operator, and is therefore functus officio. Counsel agrees the arbitrator should retain jurisdiction to deal with compensation.

AWARD: The arbitrator finds himself to be functus officio except for the issue of compensation, on which he retains jurisdiction.

AUTHORITIES: Consumers Gas Co.and International Chemical Workers Union, Local 161, 1974. Russell on Arbitration, 17th ed. pp. 237, 239, 242, 276. 6 L.A.C. (2d) 61. Trade Union Act Labour Relations Act

DECISION 87-127b

Metropolitan Authority, carrying on business in the County of Halifax - AND - Halifax Civic Workers Union, Local 108.

R.Lorne Mac Dougall, Arbitrator

Bruce Evans, for the Union
A.William Cox, for the Employer
June 14, 1988

ISSUES: Remedies- Type of Remedy - Reinstatement 2:1470, Type of Grievance - Overtime, 2:1422, Type of remedy - Damages - Interest 2:1414, Mitigation, 2:1412.

CIRCUMSTANCES: In an initial award reinstating the grievor, it was stated the grievor shall be paid "the same wages that he would have received had he worked his regular hours...". The grievor claimed for lost overtime, five days in lost holidays, and interest. The Employer claimed overtime was not included in the initial award, that the grievor's refusal to accept an offer of earlier reinstatement should be taken into account, and that the grievor's record of absenteeism should be considered when determining entitlement to overtime.

AWARD: The grievance succeeds in part. In spite of the grievor's record of absenteeism, he is entitled to overtime, but not based upon averaging; rather,it should be based upon replacements. The collective agreement does not give the Arbitrator authority to award interest. The grievor did not discharge the burden of establishing entitlement to holiday pay.

AUTHORITIES: Re Keeprite Inc and Keeprite Workers Independent Union (1982), 8 L.A.C. (3d) 35.

DECISION 87-128

Farmers Co-operative Dairy Ltd. AND Teamsters Chauffeurs Warehousemen & Helpers Local 927

J.A. MacLellan, Arbitrator

Susan Coen, for the Union
Donald H. MacDougall, for the Employer
November 27, 1987

ISSUES: Overtime 5:3200; Interpretation - Words and Phrases- Day or Work Day 4:2100, 8:2120.

CIRCUMSTANCES: As a result of a change in the Employer's shift schedule, the grievor's regular days off were changed from Wednesday and Thursday to Friday and Saturday. This change was implemented over a weekend, with the result that the grievor worked seven consecutive days, Friday to Thursday. The grievor claims overtime for the sixth and seventh days worked. The Employer argues that overtime is not applicable as the grievor received two days off each week, and that the sixth and seventh days part of a shift cycle, not consecutive days in overlapping cycles.

AWARD: The grievance is dismissed. The evidence supports the Employer's interpretation that the sixth and seventh days are within the same shift cycle, not consecutive days.

DECISION 87-129

Citadel Properties Limited AND Bakery Confectionery and Tobacco Workers Union Local 446

J.A. MacLellan, Arbitrator

Rene Quigley, for the Union
Kain McCaskill, for the Employer
November 27, 1987

ISSUES: **Skill and Ability 6:3000, Criteria of Ability and Qualifications 6:3300**

CIRCUMSTANCES: The grievor claims the employer violated the collective agreement when it hired a non-unit person for a job for which he had applied. The Employer argues it had concerns about the grievor's ability to do the job.

AWARD: The grievance is dismissed. The Employer's decision was made fairly and without discrimination, and found the grievor was not qualified. Therefore, the seniority and preference provisions are not applicable.

AUTHORITIES: Brown & Beatty Canadian Labour Arbitration (2d ed, 1984) at p. 295

DECISION 87-130

Municipal Spraying and Contracting Limited AND International Union of Operating Engineers Local 721

William H. Kydd, Arbitrator

Mr. Ronald Pink, Mr. Gordon Forsyth, for the Union
Ms. Terry Roane, Mr. Ron Pizzo, for the Employer
November 27, 1987

ISSUES: Adjournments 3:2300; Contracting Out 5:1300, 5:0000, Remedies 2:1424; Work Assignment - Contracting Out 5:1300, Employees Outside Unit 5:1400, Remedies 2:1424, 5:1500.

CIRCUMSTANCES: The Union alleges that the Employer violated the collective agreement with the Construction Association Management Bureau by employing non-union workers and union members not referred by the union on four job sites. The union argues that the work involved on these sites was of a commercial or industrial nature, and that the provisions of the collective agreement apply. The Employer moved for an adjournment. The Union did not agree, so the Employer argued the motion on several points, including a conflict between section 41 (1) (a) and 103 (7) of t the Trade Union Act, possible violation of sections 7 & 15 of the Charter by section 103(7), and concurrent jurisdiction with other proceedings.

AWARD: The motion is denied. The specific provisions of s.103(7) override the general provisions of s.41 (1) (a) S. 7 of the Charter does not protect 'economic' rights, S.15 of the Charter applies to individuals, not corporations, and without the consent of both parties, the arbitrator does not have authority to order an adjournment. After this ruling, counsel for the Employer left the hearing. No evidence was presented for the Employer.

The grievance succeeds. The work involved is of an industrial or commercial nature. Non-union employees or union members not referred by the union were employed at these sites. Damages are set at what union members could have earned had they been employed on these jobs.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (2d ed) at p. 126; Re: Ontario Council of Regents for Colleges of Applied Arts and Technology (St. Lavrence School) and Ontario Public Service Employees Union, (1966) 24 L.A.C. (3) 144; MacLeod et al v. Egan 1975 1 S.C.R. 517; Board of School Trustees of School District No. 57 Prince George and International Operating Engineers Local 858; Yorkdale Drywall Limited v. United Brotherhood of Carpenters (1987) 79 N.S.R. (2d) (App. Div.); Smith Kline and French Laboratories et al v. the A.G. Canada (1985), 24 D.L.R. (4th) 321 (Federal C.A.); Re: Surrey Union Mendonca et al (1985) 67 B.C.L.R. 310 (S.C.); Mund v. Medicine Hat (1985), 67 A.R. 11 (Q.B.); Parkdale Hotel Limited v. The A.G. of Canada (1986), 27 D.L.R. (4th) 19 (F.C.C.A.); United Brotherhood of Carpenters and Joiners and MacDougall Construction Limited (unreported), 1982 (F.B. Kelly); Re: Blouin Drywall Contractors Limited v. United Brotherhood of Carpenters and Joiners of America Local 246 (1975), 57 D.L.R. (3d) 199 (O.C.A.); Landing Construction Limited et al v. Labourers International Union et al (1986) 72 N.S.R. (2d) 26 (N.S.S.C.A.D.).

DECISION 87-131

Construction Management Bureau Limited AND International Brotherhood of Electrical Workers Local 1852

R.Lorne MacDougall, Arbitrator

Greig MacLeod, Hugh Simpson for the Employer
Bernard Boudreau, for the Union
December 2, 1987

ISSUES: Vacation - Computation of Vacation and Vacation Pay 8:3230; Pension Plans - Benefits 4:1400

CIRCUMSTANCES: The union introduced a pension scheme for its members, to be funded by contributions of $1.00 per hour worked by each employee, to be deducted from the employees' wages. The calculation of vacation allowance is based on "gross earnings". The union argues that this includes the pension deduction, the employer that it does not. The employer argues that it makes the deduction as it does for unemployment insurance or Canada pension.

AWARD: The grievance succeeds. The pension plan contributions are in fact, and in effect, employee contributions, not employer contributions. They are to be considered part of gross earnings when calculating vacation allowance. The arbitrator retains jurisdiction with regard to the implementation of the award.

DECISION 87-132

Halifax Dartmouth Industries Limited AND Industrial Union of Marine and Shipbuilding Workers of Canada Local 13

Innis Christie, Arbitrator

J.K. Bell, for the Union
Brian Johnston, for the Employer
December 2, 1987

ISSUES: Overtime - Distribution of Overtime 5:3220, Persons Normally Performing 5:3222, Right to Claim 5:3220, 4:2100.

CIRCUMSTANCES: The grievor claims the Employer violated specific provisions of the collective agreement by having a temporary chargehand do overtime work the grievor was qualified to do. The provision reads "Chargehands shall not replace employees on overtime". The Union argues this means a chargehand cannot do tradesmen's work on overtime, except in limited circumstances set out in the agreement but which do not apply in the present case. The Employer argues that the grievor was not replaced since he was not working overtime on that job to begin with. The Employer argues that as the grievor never worked on the job in question, he could not be replaced by the chargehand.

AWARD: The grievance is dismissed. The provision is ambiguous, and neither past practice nor the history of the clause are of much assistance. However, taking these provisions together with the provisions which give employees working on the job priority for overtime on that job, the employer's argument is accepted. As the grievor never worked on the job in question, he has no priority claim to overtime on the job, and cannot, therefore, be said to have been replaced.

AUTHORITIES: Halifax Dartmouth Industries Limited and Industrial Union of Marine and Shipbuilding Workers of Canada Local 13, unreported, Darby, September 30, 1987.

DECISION 87-133

Bolands Limited AND United Food and Commercial Workers Local 1973

Bruce Outhouse, Arbitrator

Raymond Larkin, for the Union
Tom Donovan, for the Employer
December 9, 1987

ISSUES: Innocent Absenteeism 7:3210; Illness or Disability-Burden of Proof - Employer Allegations 7:3250, Return to Work 8:3340; Medical Examinations 7:3220, 7:3230, 7:3250.

CIRCUMSTANCES: The grievor was discharged for his inability to attend work on a regular basis. He had been warned and counseled about his absences. The Employer has treated this case as one of innocent absenteeism, rather than as one of sick leave abuse. The Employer has requested access to the records of the grievor's physician. The grievor has refused to consent to this, but has volunteered to be examined by a physician of the employer's choosing. The Employer has not exercised this option.

The Union argues that as the collective agreement contains provisions for sick leave and disability, the grievor cannot be discharged. The Union further states that the employer has the right to have an employee examined by a physician of its choosing,and cannot seek to obtain the records of the grievor's physician. The Employer argues that the provisions of the collective agreement were not meant for "abnormal" cases such as this, and that it still has the right to dismiss for innocent absenteeism. The Employer argues that it needs access to the grievor's medical records if it is to bear the onus of proving him unfit to attend work. If this burden of proof were on the employee, the Employer states it would not need to examine the records to the same extent.

AWARD: The grievance succeeds. The inclusion in the collective agreement of sick leave and disability pension provisions show that the parties have turned their minds to this problem. The provisions are so comprehensive that dismissal for innocent absenteeism is ruled out so long as an employee qualifies for benefits under these plans. The inclusion in the agreement of a statement that the union assist in promoting productivity and reducing absenteeism does not override the provisions on sick leave and disability. Once the grievor exhausts his rights under the collective agreement, if he cannot show a reasonable liklihood of attending work on a regular basis he may be discharged for absenteeism.

With respect to the issue of medical records: although it is not necessary to the determination of this proceeding, the arbitrator expresses his opinion on the matter. Proper allocation of the burden of proof should resolve this issue. Once an employer establishes excessive absenteeism, the onus shifts to the employee to establish the likelihood of reasonable future attendance. If no medical evidence is introduced by an employee, a negative inference may be drawn.

The grievor is to be reinstated without loss of salary or benefits.

AUTHORITIES: Re: DeHavilland Aircraft of Canada Ltd. and United Automobile Workers, Local 112 (1982), 9 L.A.C. (3d) 271 (Rayner); Re: N.S.G.E.U.... and Civil Service Commission (Sept. 1987), unreported, Outhouse; Re: United Automobile Workers Local 397 and Barber-Ellis of Canada Ltd. (1968), 19 L.A.C. 163 (Schiff); Re: United Automobile Workers and Massey-Ferguson Ltd. (1969), 20 L.A.C. (3d) 24 (Brown); Kelsey-Hayes Canada Ltd. and U.A.W. Local 195, unreported (Samuels); Re: Government of Province of Alberta and Alberta Union of Provincial Employees (1987) 29 L.A.C. (3d) 218 (Tadman)

DECISION 87-133b

Bolands Limited AND United Food and Commercial Workers Union, Local 1973

Bruce Outhouse, Arbitrator

Raymond Larkin, for the union.
Thomas Donovan, for the employer.
May 16, 1988.

ISSUES: Remedies - Type of Grievance - Discharge or Suspension 2:1421; Reinstatement, 2:1470

CIRCUMSTANCES: The grievor was terminated for innocent absenteeism. The parties were unable to agree on the issue of compensation. Following the order of reinstatement, the hearing was reconvened to deal with the compensation question.

AWARD: The employer's approach to the compensation issue is both reasonable and sanctioned by authority.

AUTHORITIES: Re Atlas steels Co. and canadian Steelworkers Union, Atlas Division (1975), 8 L.A.C. (2d) 350.

DECISION 87-134

J.W. Rudderham Limited AND United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada Local 682

Charles O'Connell, Arbitrator

Gordon Forsyth, for the Union
Alan Stapleton, for the Employer
December 10, 1987

ISSUES: Pension Plans - Benefits 2:1200, 4:1400; Insurance and Welfare Plans - Incorporated into Collective Agreement 2:1200, 4:1200.

CIRCUMSTANCES: The Union grieves that the employer failed to make payments to the administrators of the pension and health and welfare funds of the union. Specific amounts owing are claimed.

AWARD: The grievance succeeds. The company agreed at the hearing to pay the amounts owing in a prescribed manner; the schedule of payments is appended to the award.

DECISION 87-135

Cape Breton Automotive and Marine Sales and Service AND International Brotherhood of Painters and Allied Trades Local 1945

Charles O'Connell, Arbitrator

J.Bernard Boudreau, for the Union
David L. Delaney, for the Employer
December 22, 1987

ISSUES: Contracting Out 5:1300, 5:0000; Work Assignment-Contracting Out - Employees Outside Unit 5:1400

CIRCUMSTANCES: This is a policy grievance alleging violation of a collective agreement between the Construction Association Management Bureau Limited and various building trade unions. The Union claims the agreement was violated by the Employer's use of non-union employees at a job site. The union claims as damages the wages and benefits which would have been earned by union members had they been employed. The Employer argues that the grievance should be dismissed as (1) painting is not within the definition of a commercial project as set out in the collective agreement and (2) the contract was awarded to another company, not bound by the collective agreement, and not to the Employer.

AWARD: The grievance succeeds. The painting work is within the meaning of a commercial project when the provisions of the collective agreement are read together with the appendix and s.89(c) of the Trade Union Act. The arrangements between the Employer and the company which was awarded the contract are such as to avoid paying union wages. The work was performed by the Employer; the employees at the job site were under the direction of and were paid by the Employer. The arbitrator retains jurisdiction to settle the amount of damages if the parties cannot agree.

DECISION 87-136

Perry Rand Limited AND the Canadian Brotherhood of Railway, Transport and General Workers Union Local 606-B

J.A. MacLellan, Chair; Leo McCormick, Peter Muttart

Boyd Lee, for the Union
Gerald Buchan, for the Employer
December 22, 1987

ISSUES: Discipline and Discharge - Grounds for - Carelessness 7:3520

CIRCUMSTANCES: The grievor was dismissed for failing to communicate to the Employer or to another bus driver, a mechanical problem with a school bus, thereby creating the potential for a serious accident. The grievor left a note for the other bus driver stating the brakes were bad, but it was not found until after the other driver had found the bus to have complete brake failure. The employer expressed a serious concern for safety, and felt that the grievor's "mental safety deficiency" could not be tolerated.

AWARD: The grievance succeeds. The grievor could not have known that the brakes were going to fail completely. He did make some ttempt to communicate the problem he had observed to the other driver. The grievor is to be reinstated with lost pay and benefits.

DISSENT: (Muttart) : The question is whether the grievor met the safety standard required of him as a school bus driver, and, if he did not, whether his termination was justified. Mr. Muttart considers that the grievor's actions were inadequate and, thereby put the lives of children at risk. The grievance should be dismissed.

AUTHORITIES: State of Suspension, Young, Canada Labour Views Co. Ltd. 1983 at p. 216; J.H Normick Inc. & Lumber & Sawmill Workers clv 159-5 (LVI 1241, March 5, 1978); Young, At the point of discharge, Canada Labour Views Co. Ltd. 1982 at p. 230; Consumers Gas Company and International Chemical Workers CLV 136-1 (LVI 1085, Sept. 5, 1976) Christie, Employment Law in Canada, Toronto: Butterworths, 1980 at p. 254-255

DECISION 87-137 *

Town of Louisbourg Police Commission AND Canadian Union of Public Employees, Local 2279

Charles O'Connell, Chair; Bruce R.McDade, Kevin MacNeil

Robert M. Crosby, for the Union
Bernard Boudreau, for the Employer
December 30, 1987

ISSUES: Jurisdiction - Sources - Collective Agreement 2:1200; arbitrability - Agreement as Primary Source of Jurisdiction 2:1200; Time Limits - Mandatory or Directory 2:3128

CIRCUMSTANCES: The union filed two policy grievances as a result of resolutions made by the employer concerning actions it intends to take. The union alleges these actions violate provisions of the collective agreement in regards to contracting out and unjust termination. The employer claims the arbitrator has no jurisdiction to hear the matter.

AWARD: The grievances are dismissed. The alleged breaches are anticipatory in nature. The union cannot apply for arbitration until such time as such actions alleged to violate the collective agreement are taken.

* See decision: 88-87

DECISION 87-138

Nova Scotia Government - Consumer Services Division **AND** The Nova Scotia Government Employees Union

David J. MacDonald, Chair; Michael Tynes, Eric Durnford

Ron Pink, for the Union
Bill Wilson, for the Employer
November 26, 1987

ISSUES: Vacancy 5:2510; Job Posting - Vacancy 5:2510; Job Posting 5:2520.

CIRCUMSTANCES: **Sometime subsequent to the death of an employee, a casual employee was assigned to the division where the deceased employee had worked. The casual employee performed work similar to that which the deceased employee had done. The union argues that the use of a casual employee violates the collective agreement in that the employer failed to post the vacancy. The employer claims that some months previous to the commencement of work in the division by the casual employee, it had been determined that the position left vacant by the death of the employee, would not be filled. There was no vacancy, and therefore the job posting provisions do not apply.**

AWARD: The grievance is dismissed. The evidence shows the employer fairly exercised its discretion in determining that the vacancy did not exist before the casual employee was assigned to the division. Examination of the work done by the casual employee reveals that he shared the work of the regular staff and did not do new work.

DISSENT: (Tynes) The grievance should be allowed. Once the employer determined that there was work to be done, the job posting provisions applied.

AUTHORITIES: Re: Oil, Chemical and Atomic Workers, Local 9-599 and tidewater Oil Company (Canada) Ltd. (1963) 13 L.A.C. p.233 (Reville Co. Ct. J.); Re: Horton Steelworkers Ltd. and United Steel Workers Local 3598 (1973) 3 L.A.C. (2d) p.55; Re: Toronto Electric Commissioners and CUPE Local 1 (1974) 6 L.A.C. (2d) p.243; Re: Air Canada and Canadian Airline Employers Association (1975) L.A.C. (2d) p.239.

DECISION 87-139

Berwick Bakery And Bakery, Confectionery and Tobacco Workers' International Union, Local 446

Innis Christie, Chair; Bill Lemmon, Robert A. Cook

Rene Quigley, for the Union
Matthew J.MacPherson, for the Employer
November 2, 1987

ISSUES: Management Rights 4:2300, Schedules 5:3100; Seniority -Shift Assignment 6:2000

CIRCUMSTANCES: The employer alters the work schedule of the grievor in order to make changes in production requirements. Before initiating the schedule changes, the employer requests that the effected employees determine the new rotation among themselves. The grievor asserts that because of her seniority and past practice for scheduling, she should be exempt from these changes. The employer acknowledges the grievor's seniority, but argues the schedule changes will be unfair and will nor allow the employer to maintain a full work week for the permanent staff.

AWARD: The grievance succeeds. Although the employer is seen to be fair and reasonable in creating the new work schedule, the collective agreement indicates that the employer did not need to include the grievor in the new shift rotation.

DISSENT: (Cook) The grievance should fail. The onus is on the union to show a practical alternative for the schedule changes which would also be fair and reasonable. The collective agreement does not indicate seniority is a factor in determining changes in shift schedules.

AUTHORITIES: Brown and Beatty. Canadian Labour Arbitration 2nd. ed., 1984, p.247; United parcel Service Limited (1981), 29 L.A.C. (2d) 202 (Burkett); Toronto East General Hospital (1984) , 13 L.A.C. (3d) 400, pp. 410 - 411; Great Atlantic and Pacific Company of Canada Ltd. (1984), 18 L.A.C. (3d) 44, pp. 49 - 50; Toronto Public Library Board (1984) 17 L.A.C. (3d) 22 (Kates); McKellar General Hospital (1986) 24 L.A.C. (3d) 97 (Saltman); Re: Board of Governors of Fanshawe College of Applied Arts and Technology and Ontario Public Service Employees Union (1984), 4 D.L.R. (4th) pp.567; Re: Council of Printing Industries of Canada and Toronto Printing Pressmen and Assistants Union No.10 (1983), 149 D.L.R. (3d) 53

PART 2

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PART 4

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